CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN THE

WESTERN DISTRICT, AT OPELOUSAS, COMMENCING, SEPTEMBER, 1842.

PRESENT:

HON. FRANÇOIS XAVIER MARTIN.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

HENRY R. LEE and others *v.* SAMUEL KEMPER and others.

Where an appellee resides in the State, service of citation of appeal must be on the party himself, and not on his counsel.

Under the act of 20th March, 1839, time will be allowed to correct any errors or omissions in the record, or in the service of citation of appeal, where such errors or omissions did not result from the fault or neglect of the applicant.

APPEAL by Kemper, from a judgment of the District Court of St. Mary, *King*, J.

Maskell, for the plaintiffs.

Splane, for the appellant.

SIMON, J. This appeal was brought up and filed on the 11th of September, 1841. A few days afterwards, the appellees' counsel filed a written motion for a dismissal thereof, on the ground that no citation of appeal had been served upon his clients;

and, in the meantime, procured a writ of *certiorari* to be issued for the production of certain documents necessary to complete the record. This last proceeding had the effect of continuing the case until the present term; and, during the interval, no step whatever was taken by the appellant to cure the defect complained of by the appellees, by causing the citation of appeal to be served upon them, instead of their counsel, on whom the said citation had been originally served.

The plaintiffs' commercial house is stated, in the petition, to be in New Orleans, where two of the partners reside; and it is clear that the citation of appeal should have been served on them, and not on their counsel. Code of Practice, arts. 198, 582. 10 La. 580.

Since the enactment of the law of 1839, we have generally allowed time to parties to correct any defect or omission existing in the records brought before us, or in the service of the citations of appeal, whenever such defects or omissions were not the consequence of their own fault or negligence. But, in this case, the appellant had more than a year to procure a new service of the citation of appeal; he had notice of the written motion of the appellees; and it was his duty to take advantage of the delay occasioned by the issuing of the writ of *certorari*, which had caused the case to be continued. Having not done so, he was clearly guilty of neglect; and he cannot complain, if, on the renewed motion of the appellees' counsel, we dismiss his appeal. We think he cannot be entitled to any further indulgence.

Appeal dismissed.

JACOB W. KING *v.* HENRY C. DWIGHT, Executor.

Subrogation, whether legal or conventional, invests the person in whose favor it takes place, with all the rights, actions, privileges, and mortgages of the creditor against his debtor.

One who has paid the debt due to a plaintiff, and been expressly subrogated to his rights, may take out execution against the defendant. Such an express subrogation, is equivalent to an authority to use the plaintiff's name in prosecuting the suit for the recovery of the debt.

APPEAL from the District Court of St. Mary, *King*, J.

W. C. Dwight, for the appellant.

Maskell, and *Lewis*, for the defendant.

MORPHY, J. The petitioner has appealed from a judgment dissolving an injunction he had obtained to arrest the execution of an *alias fieri facias*, on the ground that he had paid the full amount of his debt. It appears from the record that Henry C. Dwight, as executor of Gideon Boyce, had caused certain property to be seized in the hands of one James Swan. That the same was sold in due course of law, at a credit of twelve months, and was adjudicated to the present plaintiff on the 7th of July, 1838. That, on the twelve months' bond becoming due, an execution was issued on it against the plaintiff, and his sureties. That on the 22d of August, 1839, plaintiff's debt having been reduced to $1240 58 by the sale of his property and divers partial payments, this balance was paid to the said executor by Thomas Maskell, who received from him a subrogation to all his rights as plaintiff in the suit in which the twelve months' bond had been taken. Under this subrogation Maskell sued out, in the name of the original plaintiff, the execution which is now enjoined. The appellant has not shown that the money paid by Maskell belonged to him, or that Maskell had paid it as his agent, or in his discharge. Maskell, on the contrary, appears to have acted on his own behalf, and took care to secure himself, by procuring from Dwight an express subrogation to all his rights. The well known effect of a subrogation, whether legal or conventional, is to vest in the person in whose favor it takes place, all the rights, actions, privileges, and mortgages of the creditor against his debtor; it, therefore, in our opinion, entitled Maskell to all the remedies existing in favor of Dwight, and he could take out an *alias* execution in the same manner as the latter himself could have done. Civ. Code, 2156. This right has, however, been denied by the counsel for the appellant. He has referred us to the case of *Fluker* v. *Turner*, 5 Mart. N. S. 707, in which we held, that he who has an interest in a judgment, without being a party on record, cannot control the execution. In that case, a creditor of the plaintiff had caused his judgment to be seized on execution, and all the latter's interest in it had been sold to the defendant in the

suit. The person who subsequently took out an execution, could not pretend to derive any authority from the plaintiff, or to exercise his rights, which had all been sold to the defendant in the suit, as, in the present case, the original plaintiff's rights and remedies have all been transferred to Maskell. Dwight's express subrogation was equivalent to an authority conferred on Maskell, to use his name in prosecuting, as he could have done himself, the recovery of the debt which he had just been paid, and which he transferred to Maskell in consideration of such payment.

Judgment affirmed.

THE MECHANICS AND TRADERS BANK OF NEW ORLEANS *v.* ALEXANDER COMPTON and others.

Notice of protest must be directed to the post office nearest the residence of the person to whom it is sent. Even where a party has been in the habit of receiving his letters at different offices, and is proved to have had a box in the most distant of the two, notice of protest directed to the latter will be bad.

APPEAL from the District Court of St. Landry, *Willson*, J.

Linton and *I. E. Morse*, for the appellants.

Lewis, for the appellee.

MARTIN, J. The plaintiffs are appellants from a judgment in favor of the defendant, Walker, the endorser of the note sued upon, on the ground of want of due notice. Two objections were made to the notice: the first, that it was not put in the post office in due time; the second, that it was not directed to the endorser, at the post office nearest to his residence.

The counsel for the plaintiffs contends, that it clearly appears from the notary's certificate that he made the protest on the sixth day of March, 1839. After stating that the letters were deposited in the post office, the notary adds that all was done in the presence of the witnesses; and the act is subscribed on the day aforesaid. This appears to us conclusive.

The notice to the endorser was directed to him at the post office in Alexandria. It is in evidence that there is a post office at Cotile,

which is nearer to his residence. There is evidence of his receiving his letters and papers at each of these offices, and that he has a box at that of Alexandria. We are of opinion that when a party receives his letters and papers at two post offices, notices ought to be sent to the office nearest to his residence, even where it appears that he has a box in the other.

Succession of John N. Field—Thomas Maskell, Administrator, Appellant.

The right of a mortgage creditor is on the thing itself, and may be exercised into whatever hands it may pass.

A sale by the administrator of a succession of property held by the deceased, subject to a mortgage, gives the mortgagee no claim against the succession. His rights cannot be affected by such a sale; and he must pursue the property in the hands of the subsequent third possessor.

Where the creditors of a succession are litigating their rights contradictorily with each other, and the value of the succession exceeds three hundred dollars, an appeal will lie to the Supreme Court, though the claim of each creditor may not amount to that sum.

Appeal from the Court of Probates of St. Mary, *Palfrey*, J.

Gibbon, for the appellant.

Dwight, for the appellee.

Simon, J. This is an appeal from a judgment sustaining the opposition of Ethan Allen as administrator of the estate of Thomas Bell, to the tableau of distribution filed by Thomas Maskell, as administrator of the estate of one John N. Field. The opposition is founded on a judgment obtained by Thomas Bell, deceased, against one Nerson, for $160, with interest and costs, on the 23d day of June, 1831, and recorded on the 6th of July following, which had the effect of a judicial mortgage on all the property of the debtor. Several years afterwards, an execution having been issued against Nerson by other creditors, it was levied on a negro man named Bell, who was sold by the sheriff, and John N. Field having become the purchaser thereof at said sheriff's sale, acquired the property subject to several anterior judicial mortgages,

the first of which appears to be the mortgage which is the subject of the opposition. John N. Field stood, therefore, towards Bell, in the capacity of a third possessor of property mortgaged to secure his claim, and was liable to be acted against as such, Bell's mortgage being a general and not a special one. Code of Pract. arts. 709, 710, 713 and 715.

The opponent contends that he is entitled to be placed on the tableau of distribution of Field's estate, for the amount of his judgment, with a privilege on the proceeds of the sale of the slave Bell, who was sold by the succession. This was allowed by the inferior court, which sustained the opposition, and the administrator of Field's estate has appealed.

From the view we have taken of the plea to our jurisdiction, filed by the appellee's counsel, we should abstain from expressing any opinion on the merits of the opposition; but it becomes necessary for us, however, in order to establish the rule by which our jurisdiction is to be tested, to examine into the quality in which the opponent stands towards the estate of John N. Field. This will, perhaps, present the anomaly of our showing the error committed by the inferior court, without being able to afford the appellant any remedy to correct it in this court.

It is clear that the appellee is not properly a creditor of Field's estate. The deceased was a mere third possessor, who, whilst in possession of the property, was subject to the hypothecary action of the creditor, in the same manner, and under the same rules and restrictions, as a third possessor of mortgaged property. Code of Pract. art. 709. The rights of a mortgage creditor rest on the thing itself, and are to be exercised into whatever hands it may pass, and cannot be affected by the sale thereof, made either by the deceased himself or by his estate. *Offutt et al.* v. *Hindley et al.* 9 La. 14. Considered in this light, the administrator of Bell's estate has nothing to claim against Field's estate, and can only pursue the property in the hands of a subsequent third possessor. If this be correct, the claim set up by the appellee is not only distinct from those of Field's creditors, but is utterly foreign to the affairs of his succession. It makes no part of the *concurso*, and the appellee cannot be said to be one of the creditors of the deceased, litigating his rights contradictorily with the others, in which

last case we have uniformly maintained our jurisdiction, although the rights or claims of each of the creditors might be under $300, provided the amount or value of the succession was above that sum. Code of Pract. art. 1049, 1050.

Under this view of the question, we think we are without jurisdiction in this case, and that the exception filed by the appellee must prevail.

Appeal dismissed.

JOHN HOLLANDER *v.* ROBERT CARTER NICHOLAS.

An overseer, though entitled to a privilege on the crop for the payment of his wages, cannot maintain an action against his employer in the parish in which the plantation is situated, where the domicil of the latter is in a different parish. The privilege granted by law to overseers, is, like all others, an accessory to the principal obligation, and must follow it.

APPEAL from the District Court of St. Mary, *King*, J.

Maskell, *T. H. Lewis*, and *W. B. Lewis*, for the plaintiff.

J. P. Conrad, and *Splane*, for the appellee.

GARLAND, J. The defendant, a resident of the parish of St. James, was sued in the parish of St. Mary, by his overseer on a plantation in the latter parish, to recover $1500, his wages for the year 1841. The plaintiff alleges that he has a privilege on the crop of sugar made on the plantation; and, on his affidavit that the defendant was removing a part of the same out of the jurisdiction of the District Court of St. Mary, a writ of provisional seizure was asked for and issued, which was levied on a portion of the crop. The account filed with the petition shows, that the wages were not due until the 1st of January, 1842, and this proceeding was commenced eleven days previous. The defendant excepted to the jurisdiction of the court, as he was not a resident of the parish in which he was sued, which exception was sustained; and the plaintiff is appellant from a judgment of dismissal.

It is admitted that the defendant is the owner of a large plantation in the parish where he was sued, but has his domicil in St.

James. The plaintiff contends that, as he has a privilege on property in St. Mary to secure the payment of his claim, he has a right to institute his action for the principal demand there, on the ground that it would be very inconvenient for him to sue the defendant at his domicil, and that his privilege might be lost by the delay and necessity of going to a distant parish, to obtain the process necessary to preserve it. He contends that there ought to be an exception in his favor.

The privilege accorded by law to overseers to secure the payment of their wages, is, like all others, an accessory to the principal obligation, and must follow it. The doctrine contended for would make the principal subservient to the accessory. The exception is not made by law, and cannot be allowed by us. Civ. Code, arts. 3153, 3184. Code Prac. arts. 162, 284.

Judgment affirmed.

JAMES A. GARRETT *v.* JOHN D. GRIMBALL and another.

The court has no authority to give damages for a frivolous appeal, when not prayed for.

APPEAL from the District Court of St. Mary, *King*, J.

There was judgment below in favor of the plaintiff, from which the defendants have appealed.

Splane, for the plaintiff.

Gibbon, for the appellants.

MORPHY, J. In this suit, which is on a note executed in favor of the plaintiff by Grimball, one of the defendants, who are ordinary partners, the evidence fully establishes that Grimball was authorized to sign the partnership name, and that Wright has frequently paid notes thus signed by his partner. We would allow damages for the frivolous appeal, if we thought ourselves authorized to grant them, when not demanded.

Judgment affirmed.

JOHN E. SPEIGHT *v.* JARED W. SANDERS, Administrator.

APPEAL from the Probate Court of St. Martin, *Briant*, J.

Magill, for the plaintiff.

Dwight, for the appellant.

SIMON, J. The claim of the plaintiff is founded on an account for services alleged to have been rendered to the deceased, in taking care of his property during a length of time; which account, after deducting certain credits, leaves a balance in favor of the plaintiff, amounting to $1550, for which he prays judgment against the succession of his employer.

The defendant first pleads the general issue, sets up certain matters in avoidance of the plaintiff's demand, and concludes by praying judgment against the plaintiff for the sum of $101 25, which is the amount of a note due by said plaintiff to the succession of the deceased, and filed with said defendant's answer. The note was executed after the death of the deceased, and is made payable to the defendant as administrator.

There was judgment below in favor of the plaintiff for the sum of $33 75, which is the balance allowed him for the value of the services proved, after deducting therefrom the amount of the note annexed to the defendant's answer. From this judgment the defendant has appealed.

An attentive perusal of the evidence has not enabled us to discover any error in the judgment appealed from. It seems to us that the plaintiff complains of it with bad grace; as, from the facts that he executed the note claimed by the administrator on the 14th of January, 1840, and that his services appear, from his own account, to have ceased on the 15th of the same month, he might, perhaps, be fairly presumed to have had no claim against the succession at the time that he executed the note. However it may be, the weight of evidence does not seem to us to preponderate so much in favor of the plaintiff, as to permit us to alter in any way the judgment appealed from.

Judgment affirmed.

CATHERINE HALL, Tutrix, *v.* JARED W. SANDERS, Administrator, and another.

Where it does not appear from the record, that the amount in controversy exceeds three hundred dollars, the appeal must be dismissed. The appellant must show that he is entitled to an appeal.

APPEAL from the Probate Court of St. Martin, *Briant*, J.

Magill, for the appellant.

Dwight, for the defendants.

GARLAND, J. This suit is brought by the tutrix of the minor heirs of William G. Sanders, deceased, against the administrator of the succession, and his security, to remove the former from office, and to compel a settlement of his account. There was a judgment of dismissal, and the plaintiff has appealed. In this court the defendants have excepted to our jurisdiction, on the ground that it does not appear that a sum exceeding $300 is in controversy. From the record we cannot ascertain the amount of the succession, and are unable to say what is the sum the parties are litigating about. It is the business of the appellant to show that she is entitled to an appeal, and having failed to do so, her cause must be dismissed.

Appeal dismissed.

CHESTER CLARK and others *v.* SAMUEL KEMPER and others.

Where an undertaker has not complied with the terms of his contract for the erection of a house, but his employer receives and uses it, the latter will be bound to pay for the value of the work.

APPEAL from the District Court of St. Mary, *King*, J.

Maskell, for the plaintiffs.

Splane, for the appellant.

SIMON, J. The plaintiffs sue as endorsees of a promissory note, originally made payable to the order of one Albert Allen, by whom it is endorsed. The note is also endorsed by other persons, who, together with Allen and the appellant, are made parties defendants.

There was a judgment by default against all the defendants except Kemper, the drawer of the note, who pleads, in his answer, that the note was given in error, it being for carpenter's work done for him by Allen, the payee of the note, in the construction of a dwelling house. He alleges that the work was bad; that the house was not built in a skillful and workmanlike manner; that the roof leaks considerably; and that he has suffered damage to the amount of $500. He also states that he gave the note before examining the work; that it was transferred to the plaintiffs after it became due; and to prove this last fact, the plaintiffs were ordered to answer certain interrogatories propounded to them by Kemper, which interrogatories have never been answered.

The plaintiffs had judgment against Kemper, for the amount claimed, from which judgment he has appealed.

The evidence shows to a certain extent that the work was bad, and that the house in question was not built in such manner as to satisfy the owner. Indeed, the testimony of all the witnesses proves that it was incompletely and unskillfully done, and that the defects were such as to occasion considerable expense to the owner in order to have it thoroughly repaired and completed, if he had chosen to do so. But the evidence shows, also, that the defendant received the house such as it was; that he has sold the house since it was finished; that he lived in it a year before selling it; and that he had no repairs made upon it before he left it.

This case is very similar to that of *Loreau* v. *Declouet*, 3 La. 3, in which this court said, that "if the owner use the building, he is bound to pay the workman the value of the labor he has expended on it." In that case, the facts proved that the owner had proceeded to have the building repaired, and the amount of the expenses being satisfactorily established, there was judgment in favor of the workman for the difference, which was really the value of his work. That judgment was so rendered, because the owner had received and used the building after it was delivered. In this case, however, it appears that the owner never had any repairs made, and that he used and sold the house; and the evidence, with regard to the real value of the work, is so uncertain and unsatisfactory, that it is impossible for us to find out what amount should be deducted from the plaintiffs' claim, or to say that they are not

entitled to the amount claimed in their petition. The judge *a quo*, thought that Kemper had not made out his defence, and that he was not entitled to any deduction; and from the state of the case, we are unable to say that he erred.

Judgment affirmed.

PIERRE LEBESQUE *v.* MARCELITE BONIN.

Where the purchaser knew of the defects before the sale, no redhibitory action will lie.

APPEAL from the District Court of St. Martin, *King*, J.

Voorhies, for the appellant.

Delahoussaye, and *I. E. Morse*, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment against him in a redhibitory action. The case turns entirely on matters of fact, and presents no question of law. It does not appear to us that the District Court erred. Much testimony was offered on each side, and in weighing it the conclusion would have been in favor of the plaintiff, had it not appeared that he knew of the disorder under which the slave labored; and bought her at the solicitation of his wife, the defendant's sister, who was well acquainted with the disorder, and was extremely desirous of having the slave as a cook, as the plaintiff owned her sister, whom he had purchased although she labored under hernia, for nearly the same price which he gave for the other.

Judgment affirmed.

ADOLPHE FOLLAIN and others *v.* HYACINTHE LEFEVRE.

Art. 439 of the Code of Practice, making it the duty of the court which grants a commission to take testimony, to fix a day for its return, was intended to obviate any dispute as to the sufficiency of the time allowed for its execution, when the case should be called for trial before its return. But the neglect of the court to fix a return day, will not render the commission null.

No evidence will be required of the official capacity of functionaries commissioned by the State.

A commission to take testimony, directed to "any one of the associate judges of the City Court of New Orleans," appeared from the record to have been executed by one *N.* Jackson. There being no associate judge of that name, on an objection to its admission, and allegation by the party that it was a clerical error for *O. P.* Jackson, an actual judge of that court: *Held*, that the record not having been corrected by *certiorari*, the error is fatal.

APPEAL from the District Court of St. Martin, *Boyce*, J.

Voorhies, for the plaintiffs.

T. H. Lewis, *W. B. Lewis*, and *I. E. Morse*, for the appellant.

MORPHY, J. The defendant is sued for the price of groceries and merchandize, alleged to have been furnished at his special instance and request to the firm of Murphy & Margain, for the use of a saw mill at Lake Chicot, in the parish of St. Martin. It is further alleged, that the partnership, although carried on under the style of Murphy & Margain, was, in fact, at the time of the purchase of those goods, composed of John B. Murphy, L. Margain, and the defendant, the latter being equally interested with Margain in dividing the profits and sustaining the losses. That the petitioners, being unacquainted with the said Margain, whom they would not have trusted, were induced to deliver the goods in consequence of the defendant's promises to become personally responsible for the same. The defendant pleaded the general issue, averring that he never was interested in the partnership of Murphy & Margain, nor ever became personally liable or bound for any of the debts of the partnership, which was a particular, and not a commercial partnership. That after the death of Margain, one of the partners, he was appointed administrator of his estate, and received a power from J. B. Murphy, the other partner,

to collect the moneys due to the partnership, and to pay its legitimate debts; that any promise he may have made to pay the whole or any part of the plaintiffs' claim, must be understood as having been made by him in his capacity of administrator and agent, &c. The plaintiffs obtained a judgment below, from which the defendant has appealed.

The counsel for the defendant has called our attention to a bill of exceptions to testimony taken under a commission directed to one of the associate judges of the City Court of New Orleans. His objections were, that the commission did not mention the time at which it should have been returned into court, and that it did not appear to have been executed by any one of the officers to whom it was directed. Article 439 of the Code of Practice, upon which the first objection is based, appears to us entirely directory. The duty imposed on the judge who grants a commission, of fixing a return day, was no doubt intended to avoid delay and all dispute about the sufficiency of the time elapsed for its execution, when the case is called up for trial before its return. We do not think that the pain of nullity attaches to or results from the neglect of the judge to fix a return day, although it is made his duty to do so. But the second objection urged by the appellants, is, we apprehend, fatal. The commission purports to have been executed by one *N. Jackson*. We have more than once held that we would not require evidence of the official capacity of functionaries commissioned in this State, and would take notice of the offices held by them; but we know of no associate judge in commission bearing the name affixed to this document. It is said to be a clerical mistake, and that the name of *O. P. Jackson* was intended to be written. If so, it should have been corrected by means of a *certiorari*. We are bound to presume that the transcript is a true one, and as the record now stands before us, we cannot consider the commission as executed by any one of the magistrates to whom it was directed.

Although the evidence of the plaintiffs is considerably weakened, when we disregard the testimony taken under the commission, yet the record contains enough, in our opinion, to sustain the judgment appealed from. In the fall of 1839, when the defendant had long ceased to be the curator of Margain's estate, the

plaintiffs' account for the articles sold to Murphy and Margain was presented to him, and payment demanded by one Darbes. He said that he would then pay in cash a part of the account, and would pay the balance if they allowed him time. In the same conversation, he stated that he would pay the whole account. To another witness, Bonaface, the defendant stated, that he would pay the account due Follain, Bellocq, and Degelos, because he had presented Margain to them; that having introduced him to the plaintiffs, he felt, in honor, bound to pay the debt, and spoke of the account as amounting to about $1000. He refused to pay an account due to Bonaface by Murphy & Margain, saying that he was not their partner; and gave as a reason why he would pay plaintiffs, that he had introduced Margain to them. The evidence shows that although defendant was not a partner with Murphy and Margain in the saw mill, he had in it, by reason of his advances to Margain, a sufficient interest to see it provided with the necessary supplies, and to incur the responsibility which he readily admitted, when the account was presented to him.

Judgment affirmed.

Désiré Judice *v.* François Chrétien.

The Registers of the Land Offices of the United States, may, like all other keepers of public records, give copies or extracts from any books or documents in their custody, and such copies, when duly certified, are admissible in evidence; but they cannot attest or certify the contents of such books or documents in any other manner.

Appeal from the District Court of St. Martin, *Boyce*, J.

Voorhies, for the appellant.

T. H. Lewis, *W. B. Lewis*, and *I. E. Morse*, for the defendant.

Martin, J. The plaintiff claims damages for a trespass committed on lands which he alleges to be his, and prays that he may be declared the lawful possessor, as owner thereof. There was a judgment against him, and he has appealed.

The case is before us on a bill of exceptions, taken by his counsel to the opinion of the District Court refusing to admit in evi-

dence a certificate of the Register of the Land Office at Opelousas, attesting that the plaintiff's claim to the premises had been allowed by the then Register and Receiver of the Office, as appeared from the books in the possession and keeping of the Register.

It does not appear to us that the District Court erred. The Registers of the Land Offices of the United States may, indeed, like all other keepers of public records, give copies or extracts of any books or documents in their custody, and such copies duly certified are admissible in evidence; but they cannot attest or certify the contents of such books or documents in any other manner.

There is an early decision on this point as to clerks of courts, in the Reports of Cases decided in the Superior Court of the Territory.

The judgment of the inferior court reserves to the plaintiff his right to claim the premises in another suit.

Judgment affirmed.

THE TRUSTEES OF THE TOWN OF ST. MARTINSVILLE *v.* JOSEPH EYSSALENNE, and another.

APPEAL from the District Court of St. Martin, *King*, J.

I. E. Morse, for the plaintiffs.

Voorhies, for the appellant,

MARTIN, J. The defendant, Eyssalenne, is appellant from a judgment maintaining an injunction, which the plaintiffs had obtained to prevent his encroachment on Madison street, as laid out in the first plan of the town of St. Martinsville.

The case turns entirely on a matter of fact, and presents no question of law. The evidence shows that Madison street, in its whole extent, according to the first plan of the town, had a width of ninety-nine and a half feet, but that afterwards the owners of the lots bordering on that street on the same side with that of the appellant, were suffered to occupy thirty-two feet of the street before their respective lots, thus reducing it to a width of sixty-seven and a half feet.

The appellant contends that he has an equal right to occupy the thirty-two feet of the street opposite to his lot. The plaintiffs and appellees allege that he has no right to avail himself of the indulgence, with which they have tolerated the encroachment on Madison street in a part of it, where such encroachment left the street of sufficient width; that the lot of the appellant is immediately in front of that on which the public buildings of the parish are erected; and that the extension of the front line of his lot towards those buildings, would render the access to the main road leading out of town towards New Iberia, extremely inconvenient; that this circumstance, joined to the utility of having a wider space open in front of the public buildings than in the rest of the street, had prevented the indulgence, of which the owners of some lots had availed themselves, from being extended to the appellant. That he purchased his lot according to the original plan on which Madison street had a width of ninety-nine and a half feet; and that one front of his lot was on that street and the other on the next, viz., Judice street; that his title never extended beyond these two fronts, and he cannot avail himself of the indulgence granted to others, especially where strong reasons militate against its extension to him.

Judgment affirmed.

BENJAMIN GRANT *v.* STEPHEN DEUEL.

To maintain an action for a malicious prosecution, the plaintiff must prove: *first*, the prosecution; *second*, that the defendant was the prosecutor, or the cause of the prosecution; *third*, that he was actuated by malice; *fourth*, that there was no probable cause for the prosecution.

In an action for a malicious prosecution, malice may be established: *first*, by proving express malice; *second*, by showing want of probable cause for the prosecution. Malice is usually inferred from the want of probable cause.

It is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for the charge. Where express malice has been proved, there must be some positive evidence to show that the prosecution was groundless, though slight evidence will be sufficient.

Grant v. Deuel.

An acquittal, or even subsequent proof of complete innocence, is not sufficient evidence of want of probable cause.

Proof that the jury entertained doubts on the evidence, or deliberated as to the guilt of the accused after the case was concluded, is proof of probable cause for the prosecution.

APPEAL from a judgment of the District Court of St. Landry, *King*, J., in favor of the plaintiff, for one hundred and twenty dollars damages.

Martin and *King*, for the plaintiff.

T. H. Lewis and *W. B. Lewis*, for the appellant.

GARLAND, J. This is an action to recover damages for a malicious prosecution, and for the injury sustained by the plaintiff's character and health in consequence of it, and of his confinement in prison at an inclement season of the year. There was a judgment rendered on the verdict of a jury in favor of the plaintiff, and the defendant has appealed.

At the November Term, 1841, of the District Court in the parish of St. Landry, the plaintiff was indicted and tried, with another person, for stealing some hogs, alleged to have belonged to the defendant, and acquitted of the charge. Being unable to give the bail required for his appearance, the plaintiff was confined in prison for several days previous to his trial, in cold weather, where it appears that he suffered considerably from the want of sufficient bedding and clothing; and it is shown that he was afterwards much indisposed in consequence of the exposure and confinement. The prosecution was commenced at the instance of the defendant, who called on the District Attorney, told him that he had been informed that the plaintiff and another person had been stealing his hogs, named the witnesses by whom the crime could be proved, and requested the attorney for the State to lay the matter before the Grand Jury.

To maintain this action, it is necessary to prove; *first*, that the plaintiff was prosecuted; *second*, that the defendant was the prosecutor; *third*, that the defendant was actuated by malicious motives; and *fourth*, that there was no probable cause for the prosecution.

That the plaintiff is the person who was prosecuted is not denied. That the prosecution was commenced in consequence of the complaint made by Deuel to the District Attorney is unquestiona-

ble. He was not, perhaps, a prosecutor, in the legal meaning of the term in England and in many of the States where the common law prevails, yet he was the *actor* or moving cause in the prosecution, and is liable in damages for any injuries the plaintiff may have sustained, unless protected by law. 2 Starkie on Evidence, 908. 2 Bouvier's Law Dic. 306. 1 Chit. Cr. Law, 1 to 10.

The malicious intention of the defendant may be established in two modes; *first*, by proving express malice; *second*, by showing that there was no probable cause for the prosecution. If the first be proved, still some evidence of want of probable cause must be given; but, slight evidence will be sufficient. 2 Starkie on Ev. 914. 1 Camp. 203. The fact of malice is usually inferred from the want of any probable cause or excuse for the prosecution. 2 Starkie, 912. 1 Salkeld, 14. 1 Lord Raymond, 374. Addison's Rep. 270.

The plaintiff has endeavored to prove express malice in this case, in which we think he has not succeeded. His counsel urges, that malice is shown from the conversation which took place between the parties in presence of the witness Thayer. The purport of this conversation was, that defendant told the plaintiff he had understood that he (plaintiff) had been stealing some of his (defendant's) hogs, which he had purchased from Caswell, and threatened to prosecute him for it. Deuel said he would have his hogs or he would prosecute. He told Grant in what way he got the hogs, and said that he would prosecute any one who should take them. Grant admitted he had killed some hogs for Caswell or his wife, and something was said about selling the hogs. In these remarks, we cannot discover that wicked and perverse disposition which shows a heart regardless of social duty, and bent on mischief. They indicate that state of feeling, which would arise in the bosom of most men when informed that their property had been unlawfully taken from them, and when they saw the supposed wrong-doer before them.

It is further urged, that the defendant entertained malicious feelings towards the plaintiff, because he had failed in his improper designs upon the person of a married daughter of Caswell's wife, and in consequence of the not very delicate remarks made

to him by the plaintiff. It appears to us that this is rather a strained conclusion. The plaintiff is not in any manner connected with the two females in question. He does not appear to have been informed of the designs of the defendant, or to have interfered in any manner with his purposes; it is, therefore, difficult to believe that the defendant, on that account, entertained towards him any such malicious feeling as would induce the commission of an unlawful and wicked act. The plaintiff and defendant had never had any difficulty previously. They lived a considerable distance apart, and were but slightly acquainted with each other. If the defendant entertained any malicious feelings, in consequence of his alleged disappointment, they would most probably have been vented upon Caswell's wife, as it is shown, that she was the person who employed the plaintiff to kill the hogs, and received the fruits of his labor.

The inference of malice is involved in the question of probable cause, which we will now consider. This is a question of law, arising out of the facts.

Where a party prosecutes another on a criminal charge, it is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for preferring the charge. 1 Term Rep. 520. 1 Salkeld, 14, 15, 21. This protection is not only one of convenience, but of justice and necessity; and if proof of want of probable cause were not required on the part of a plaintiff, every prosecutor would be exposed to an action, in every case of acquittal. There must be some positive evidence to show that the prosecution was groundless. 2 Starkie on Ev. 913. 15 La. 279. 2 Wash. C. C. R. 465. 1 Peters' Dig. 62, Nos. 300, 301.

It is not sufficient, on the part of the plaintiff, to show that he was acquitted of the charge; he must prove that there was no reasonable ground for it. 9 East, 361, 363. It is not necessary, in the present case, to detail all the evidence given on the trial, to show that there was no probable cause for the indictment. It was, in our opinion, sufficient to authorize the acquittal of the plaintiff; but it is not every verdict of "not guilty", nor even subsequent proof of complete innocence, that shows a want of proba-

ble cause in the incipient stages of a prosecution. A man's conduct may, from his folly, his neglect, or his ignorance, be such as to justify a suspicion of guilt, and produce a prosecution in the course of which it may be made to appear that he is clearly innocent; but this will not authorize an action for a malicious prosecution. But independent of the facts of a case, there are certain acts on the part of the tribunals, which the law says go very far to show probable cause. If it appear that the jury, on the trial of the plantiff, entertained doubts about the evidence, and deliberated as to his guilt after the case was concluded, it seems to be evidence of probable cause. 2 Starkie on Ev. 916. 3 Esp. R. 7.

In Massachusetts it has been held that the conviction of the plaintiff by a justice having jurisdiction of the offence, is conclusive evidence of probable cause, although he was acquitted on appeal. 15 Mass. 243. In Virginia, a magistrate's committing a person accused of felony, or binding him in a recognizanee to appear at court and answer the charge is sufficient evidence of probable cause, though the party be afterwards acquitted; unless he prove clearly there was no probable cause. 4 Munford, 462. In this case, it appears the Grand Jury not only found a true bill, but that the petit jury deliberated for ten or fifteen minutes as to their verdict. These are strong circumstances of probable cause for the prosecution, in the absence of any proof of fraud or perjury to produce such results.

Independently of the legal presumptions of law already stated, the evidence discloses sufficient grounds of probable cause. Deuel had such a legal right to the hogs as would enable him to maintain a prosecution for stealing them. He was informed by Arnais, some months before the District Court, that the plaintiff and Caswell had killed his hogs. The hogs had disappeared, and when the defendant, in the conversation at Thayer's, charged the plaintiff with stealing them, he did not make any such explanation as was calculated to remove the defendant's suspicions. When he spoke to Caswell on the subject, he says that he replied: "if I have killed any hogs of yours make me suffer for it." There is no doubt that some hogs were killed. All the witnesses state that fact; and the question is, whether they were the hogs of Deuel purchased at the sheriff's sale of Caswell's property? Caswell and

his wife swear that they were not; but were taken out of a gang that belonged to Caswell's wife as her separate property. Bihm, who assisted Grant in killing the hogs, says that they were Caswell's wife's. None of the other witnesses knew to whom the hogs belonged, nor what marks they bore, except Arnais, who says positively that they were Deuel's hogs; and Henry Ort swears that Caswell's wife told him that the hogs Grant killed belonged to Deuel, being the same purchased by him at the sheriff's sale, and told him to tell Deuel that she would pay for six of them if he would not prosecute.

It has been strenuously urged upon us that the witness Arnais is unworthy of belief, and that his testimony carries falsity upon its face. We cannot so consider it. One witness says that he would not believe Arnais at all. One of the jury being sworn, says that he knows him, and has "no reason to disbelieve him."

In conclusion, we have to say, that actions of this description are not to be favored. We would scarcely fix a limit to the damages in a case where it could be shown that any one, for malicious and vindictive purposes, had availed himself of the criminal laws of the country to injure and oppress another without cause; but, we are unable to see any such purpose on the part of the defendant; and public policy and the proper administration of the criminal code, require us to protect him.

The verdict of the jury is set aside, and the judgment annulled; and ours is for the defendant, with costs in both courts.

The State v. Eugene Martel and others.

Where the condition of a recognizance is, that the principal shall appear at court to answer such matters and things as may be objected against him on behalf of the State, and shall not depart the said court, without leave thereof; and no formal surrender has been made of him to the sheriff by his sureties, and the accused effects an escape from the court room while the jury are deliberating on his case, the recognizance will be forfeited. His sureties might have released themselves, at any time, by a surrender of their principal; but until manifesting, by an actual surrender, their intention to be no longer bound, the principal remained in their custody, notwithstanding his appearance in court.

The State v. Martel and others.

APPEAL from the District Court of St. Landry. Eugene Martel being in custody under an indictment for perjury, was released on entering into a recognizance in the sum of $2000, with Chachère and Briant, as his sureties, the condition of which was as follows: "That if the said Eugene Martel shall personally be and appear before the Fifth District Court, in and for the parish of St. Landry, on the 25th day of November instant, or should the said court not be then held, then, on the first day afterwards on which the said court shall be held, then and there to answer to such matter and things as shall be objected against him on behalf of the State, and shall not depart the said court without leave thereof, then this recognizance to be void." Martel having appeared on the 25th of November, was arraigned, and his trial deferred until the following May term, when, as the jury were deliberating on their verdict, he effected an escape. The jury returned a verdict of guilty. The accused not appearing, and his securities having failed to surrender him, judgment was rendered against them, *in solido*, for the amount of the recognizance. The sheriff, and the deputy sheriff, proved that Martel had never been surrendered to either of them, by his sureties. The former testified that having been informed that the accused intended to effect an escape, he placed himself in the box with him, for the purpose of preventing the accomplishment of his purpose. The deputy sheriff testified, that while holding Martel, with a view to prevent his escape, he received a violent blow on the head, which compelled him to let the prisoner go. The court, *King*, J., gave judgment against the principal sureties, *in solido*, for the amount of the recognizance, from which judgment the latter have appealed.

Martin, for the State.

Linton and *Voorhies*, for the appellants.

MARTIN, J. The defendants, Chachère and Briant, sureties of Martel, on a recognizance, are appellants from a judgment against them. They had produced the body of their principal, who had been put upon his trial, and while the jury had withdrawn to consider their verdict, forcibly made his escape.

The counsel for the appellants have contended, that by producing the principal at the first call, the condition of their bond was complied with; that he had been placed in the custody of the sheriff,

and that they were not answerable for his escape from that officer. Nothing on the record shows that the sureties surrendered their principal, or that he was placed in the custody of the sheriff. The condition of the bond is, that the principal shall appear at the court, "*and shall not depart the said court without leave thereof.*" The breach of the recognizance is his departure without leave of the court. It is true the defendants might, at any time, have discharged themselves from their recognizance by the surrender of their principal; but no such surrender appears to have taken place. Notwithstanding the production of the principal, he remained in the custody of the defendants, his bail, until they manifested their design to continue no longer bound for him, by an actual surrender; for the recognizance expressly binds them after his appearance, in case he should *depart the said court without leave thereof.*

It is true that while the jury were out, the sheriff was informed that the accused intended an escape, and that he had armed himself to facilitate it; that the sheriff asked him whether he was armed, and being answered in the affirmative, required him to surrender his arms; that on his refusal, the sheriff called for aid, and that a struggle ensued, during which the escape was effected. If this may be called an escape from the sheriff, it cannot avail the appellants, because, having never surrendered the principal, he was still in their keeping.

The act of the legislature, passed in 1837, (Acts of 1837, p. 99, sec. 2,*) is conclusive against the defendants. It says ex-

* This act provides: Sect. 1. That all the sections of the said act [entitled an act supplementary to an act entitled, an act relative to the recovery of the amount of the bonds, obligations, and recognizances due to the State in criminal cases, &c., approved March 13th, 1818,] approved April 2d, 1835, except the seventh and eighth, be repealed; and that hereafter it shall be the duty of the Attorney General, and the several District Attorneys, in their respective districts, on the second or any other day thereafter, of each regular term of the Criminal Court of New Orleans, or of the District Court, leave of the court first had and obtained, which leave shall always be presumed, to call any or all person or persons who may have entered into any bond, recognizance, or obligation whatsoever, for their appearance or attendance at court, and also to call on the surety or securities to produce *instanter* in open court the person of such defendant or party accused; and upon failure to comply therewith, on motion of the attorney representing the State, the court shall forthwith enter up

pressly, that the appearance and answer of the party accused, shall not operate as a discharge or release of the security from his responsibility, until after the trial and conviction or acquittal of the accused, unless the surety make a formal surrender of the accused in open court, or in the prison of the parish, and not otherwise. This was not done in the present case.

The defendants rely upon the decision of this court, in the case of *The State* v. *Cotton*, 19 La. 550. An examination of that case shows a very different state of facts. It was clear that Cotton, the accused, did not intend to escape from custody, or to evade a trial. His temporary absence from the court-house was for the purpose of procuring the attendance of his witnesses, and produced by being misinformed as to the day his trial was to take place.

Judgment affirmed.

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judgment against both principal and securities, *in solidum*, for the full amount of the bond, recognizance, or obligation, which judgment at any time during the same term of the court for all the parishes of the State except the parish of Orleans, and for said parish of Orleans at any time within ten judicial days after notice of said judgment to the parties, may be set aside upon the appearance, trial, and acquittal, or upon the appearance, trial, and conviction, and punishment of the defendant or party accused; *provided*, that such judgment shall not be rendered in case it shall be made to appear to the satisfaction of the court, by the evidence of one or more disinterested and creditable witness, that such defendant or party accused is prevented from attending by some physical disability existing at the time.

Sect. 2. That hereafter the appearance and answer of any defendant or party accused, upon call made as provided for in the first section of this act, shall not operate as a discharge or release of any surety from his responsibility, and no such surety shall be discharged or released from his responsibility until the final trial and conviction or acquittal of such defendant, or party accused; *provided, however*, that any surety may be relieved from responsibility, by making a formal surrender of the defendant or party accused to the sheriff or his deputy, in open court, or within the four walls of the prison of the parish, and not otherwise.

Sydalise Thompson *v.* Girard Chrétien and another.

In an action on a joint contract, all the obligors must be made defendants, though one of them may have performed his part, or may be domiciliated in a parish beyond the jurisdiction of the court, parties contracting joint obligations being considered to waive the personal privilege of being sued before the court having jurisdiction over the places of their domicil; and the judgment must be against each defendant, separately, for his proportion.

In an action on a joint contract, the suit was dismissed by the inferior court as to one of the defendants, on the ground of his domicil being in a different parish. Plaintiff took no appeal from the judgment of dismissal, but obtained a judgment against the other defendant. On an appeal by the latter: *Held*, that the action being on a joint contract, both contractors must be before the court; that the plaintiff having failed to make use of the means given him by law to reverse the erroneous decision of the inferior court, cannot avail himself of his own neglect; and that there must be judgment as in case of nonsuit.

Appeal from the District Court for the parish of St. Landry, *Lewis*, J. This was a action by the widow of one John Thompson, suing in her own right, and as the mother and natural tutrix of her minor children, against Girard Chrétien, a resident of the parish of St. Martin, and Hypolite Chrétien, of the parish of St. Landry. The plaintiff represents that her late husband, Thompson, believing himself largely indebted to the United States, conveyed to the defendants a large amount of property, to be sold or otherwise disposed of by them, to indemnify themselves against any loss they might sustain, as heirs of their deceased brother, Louis Chrétien, in consequence of the obligation of the latter to the government as security for Thompson. That the defendants advertised the property for sale; became themselves the purchasers of nearly all, at a great sacrifice; and have ever since possessed it. That its actual value greatly exceeded the amount which the defendants paid to the United States on account of Thompson. The petition further represents, that the defendants, to prevent Thompson from ever obtaining any benefit from the property conveyed to and subsequently sold by them, induced him to execute an act before a notary, by which he ratified the sales made by them. That the only consideration for that act, was the payment by the defendants, as heirs of their brother, of a sum of $14,806 27, to the United States. That immediately after the exe-

cution of the act of compromise, the defendants applied to Congress to have the amount paid by them refunded, and received $12,999 of the $14,806 27, originally paid by them, with interest thereon at six per cent, on the ground that the amount had been illegally collected from them. That, in consequence, the consideration for which the property was transferred to the defendants by Thompson, has wholly failed. The plaintiff concludes with a prayer, that the acts of sale to, and of compromise with the defendants, may be annulled; that they may be ordered to convey the property so obtained by them to the plaintiff, or to account for the value of any which may have been sold by them; or, in case such conveyance should not be decreed, that the defendants be ordered to pay to the plaintiff the amount received by them from the United States, with interest from the time when it came into their hands.

Girard Chrétien excepted to the jurisdiction of the court, on the ground that his domicil was in the parish of St. Martin. The exception was sustained, and the petition dismissed as to him. The plaintiff took no appeal from the judgment of dismissal.

Hypolite Chrétien having answered, there was a judgment against him for the whole amount, and the plaintiff was considered to be entitled to recover.

Lewis, for the plaintiff.

I. E. Morse, and *Voorhies*, for the appellant.

Simon, J. The appellant seeks the reversal of a several judgment against him for the whole claim of the plaintiff on a contract by which his co-defendant and himself are alleged to be bound to account for sundry tracts of land, slaves, &c., conveyed to them by Thompson the deceased, to indemnify them and a co-heir of theirs, against the consequences of a suretyship into which their ancestor entered for the husband of the plaintiff, in his bond to the United States as collector of a certain tax. The District Court sustained the plea of his co-defendant to its jurisdiction, on the ground of his being a resident of another parish. The counsel for the defendant Hypolite Chrétien, urges that nothing is due to the plaintiff; that if any thing was due, he was liable for one half only; and that the action being a joint one, no

judgment can be given otherwise than contradictorily with both the joint defendants.

The view which we have taken of this case, renders it useless that we should attend to either of the two first grounds of defence. The obligation of the defendants is a joint one, for they bound themselves to do the same thing, and the Civ. Code, art. 2075, provides, that "when several persons join in the same contract, to do the same thing, it produces a *joint* obligation." In every suit on a joint contract, all the obligors must be made defendants (Civ. Code, art. 2080); even where one of them has performed his part of the obligation (Ib. art. 2082); and "the judgment must be rendered, *against each defendant separately for his proportion.*" Ib. art. 2081.

The counsel for the appellee has contended that he complied with all the requisites of the Code in making both the joint obligors parties to the suit, and that the act of the court in dismissing one of the defendants, ought not to be visited on the plaintiff.

To this, the counsel for the appellant has replied, that it does not suffice that all the obligors should be made parties; but it is essential that all should remain in court till judgment is pronounced, for otherwise it cannot be rendered according to the provisions of the Code, in art. 2081. He has relied on the case of *Loussade* v. *Hartman et al.* 16 La. 119, in which we reversed the judgment, because it was rendered against two obligors only, although four of them were named as defendants in the petition, but not cited. In the case of *Mayor &c. of New Orleans* v. *Ripley et al.*, 5 La. 120. We affirmed a judgment ordering the discontinuance of a joint suit, on the ground that the plaintiff had discontinued it as to some of the defendants.

This court was so fully impressed, in the case of *Toby et al.* v. *Hart et al.*, 8 La. 523, with the necessity of all the joint obligors being made parties to the suit, that we thought ourselves authorized by that necessity to create an additional exception to the general rule of the Code of Practice, art. 162, that "one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicil or

residence," and we held that parties contracting joint obligations, may be considered as having waived their personal privilege.

The present case, however, differs from that of the *Mayor &c.* v. *Ripley et al.*, in this, that in that case the plaintiffs dismissed some of the obligors, and from that of *Loussade* v. *Hartman et al.* in this, that there the plaintiff neglected to have two of the defendants cited, while the present plaintiff submitted to the decision of the court (notwithstanding her opposition,) sustaining the plea to the jurisdiction of the defendant's co-obligor, whom they had made defendant.

The law leaves to every suitor the right, and the means, of averting an injury which may result to him from any erroneous decisions of an inferior court. If he neglects to exercise that right, and to use those means, he alone is to blame; and he cannot avail himself of his own neglect, to resist the exercise of any right which this neglect may give to the other party. *Unicuique sua culpa nocet.* The plaintiff might have appealed immediately from the interlocutory order sustaining the plea to the jurisdiction, and even after the final judgment he might, perhaps, have appealed and obtained relief.

That the order was an erroneous one, clearly results from our decision in the case of *Toby et al.* v. *Hart et al.*

It is, therefore, ordered that the judgment be annulled, and that ours be for the defendant and appellant as in case of nonsuit, with costs in both courts.

ANDREW JACKSON PORTER and others *v.* JOHN MUGGAH and others.

Heirs of age can accept a succession simply, or do acts rendering themselves unconditionally liable. Minors are necessarily beneficiary heirs.

Art. 996 of the Code of Practice, which authorizes actions for debts due from a succession to be brought before the ordinary tribunals, where the heirs, though all or some of them be minors are in possession of the estate, should, perhaps, be confined either to heirs absolute, or to beneficiary heirs in possession of a succession after it has been fully administered. But where a succession appears to have had but few

debts, and to have been administered to a certain extent, and to have been in the possession of the widow and heirs of the deceased for several years, an action to recover a debt due by it, may be brought before the courts of ordinary jurisdiction.

APPEAL from the District Court of St. Mary, *Boyce*, J.

Splane, for the plaintiffs.

Crow and *Voorhies*, for the appellants.

MORPHY, J. The plaintiffs to whom there is a balance due of $1927 63, on two judgments formerly obtained against Edward and James Muggah, as the heirs of John Muggah, represent that James Muggah died some time since in the parish of St. Mary, leaving for his heirs, John Muggah, James Muggah, Henry S. Muggah, David Muggah, Charles R. Muggah, Julia Muggah, and Thomas Muggah, the last four mentioned being minors, represented by their tutor, John Muggah; that the succession of James Muggah has been accepted purely and simply by the said heirs, who have thereby rendered themselves unconditionally liable for the payment of the debts of their ancestor, whose property they are in possession of. After setting up divers matters of defence, the defendants pleaded to the jurisdiction of the District Court. There was a judgment against each of the heirs of James Muggah, for their virile share in one half of the claim of plaintiffs against Edward and James Muggah; and the heirs of the latter have appealed therefrom.

We have had some doubts whether the plea to the jurisdiction of the District Court should not have been sustained, as this case has much analogy to that of Greig, against the same defendants. 11 La. 359. In the latter case, however, James Muggah died during the pendency of the suit against him, and his succession was in the care of an administrator, who was also the tutor of the heirs; whereas, the present suit is brought against his heirs, who are proved to have remained in the possession and enjoyment of the property he left for a number of years. It is true, that the heirs of age could alone have accepted the succession purely and simply, or have done acts rendering them unconditionally liable, because minors are necessarily beneficiary heirs. Art. 996 of the Code of Practice, however, authorizes suits to be brought before the ordinary tribunals, when the heirs, whether all or some of them

be minors, are in possession of an estate. This provision, which is by no means free from ambiguity when compared with the other articles of the Code on the same subject, should, perhaps, be confined either to heirs absolute, or beneficiary heirs who have come to the possession of a succession after it has been fully administered. 4 La. 202. 5 Ib. 386. Civ. Code, arts. 346, 998, 1006. In the present case, the estate appears to have had but few debts, to have been administered to a certain extent, and to have been in the possession of the widow and heirs of the deceased for several years. Under such circumstances, we think that article 996, above quoted, justifies the bringing of suits before the courts of ordinary jurisdiction. *Saunders* v. *Taylor*, 6 Mart. N. S. 519.

On the merits, the evidence in the record fully sustains the judgment appealed from.

Judgment affirmed.

Succession of Thomas E. Bowles—Alexander L. Field, Curator, Appellant.

Posterior testaments, which do not expressly revoke prior ones, will annul such dispositions in them, as are incompatible with, contrary to, or entirely different from the provisions of the former. Thus, the appointment of one as sole executor, will annul any appointment of another executor made in a previous will.

Appeal from the Probate Court of St. Mary, *Sallis*, acting J.

Dwight, for the appellant.

Maskell, and *Lewis*, contra.

Garland, J. The appellee, Eleanor Mathison, being authorized by her husband, presented her petition to the Court of Probates, alleging that Thomas E. Bowles had died a short time previously, having made a nuncupative will by public act, in which she was instituted sole heir and universal legatee, and appointed executrix. She prays for the registry and execution of the will, and that letters testamentary may be issued to her. On the same day, the Probate Court decreed according to the prayer of the

petition, and soon after the executrix was qualified. From this judgment, Field, the curator of the interdicted mother of the testor, has appealed.

In this court the appellant assigns various errors apparent on the face of the record; but the view we have taken of the case, makes it unncessary to mention, or to decide but upon one objection.

In another case, which has been submitted to us with this, (*post* p. 33,) Mathison, the husband of Eleanor Bowles, presents to the lower court a petition, stating the proceedings had in this case, and alleging that the testator had made another will, by private act, in Tennessee, where he died, in which said Eleanor is still the instituted heir and universal legatee, but upon conditions different from those specified in his first will, and said Mathison is appointed the sole executor. A copy of the last will, alleged to have been admitted to probate in Tennessee, was presented, and a prayer made for its registry and execution, according to law. This application was granted, and Mathison received letters testamentary. This last instrument he insists is legal and binding.

The tacit revocation of a will, results from some disposition of the testator in a subsequent testament, or from some act which supposes a change of intention. Civ. Code, art. 1684. Posterior testaments which do not, in an express manner, revoke the prior ones, annul in the latter such of the dispositions as are incompatible with, contrary to, or entirely different from the new ones. Civ. Code, art. 1686. By the last will, Mathison is appointed sole executor, instead of his wife. This is such a change in the intention of the testator, as revokes the nomination of Eleanor Mathison, as executrix; to which, in fact, she seems to have submitted. 12 La. 19. The granting letters testamentary to her was done in error, and the judge, in his judgment according them to Mathison, should have annulled those given previously to his wife.

As the mere recording of a will purporting to have been made by public act, cannot in any way injure the appellant or effect his rights, we see no utility in inquiring into the manner in which it was done. If the party wish to sue to annul the instrument, the fact of the paper being on record presents no obstacle to his doing so.

The judgment of the Probate Court, so far as it orders the ex-

ecution of the will in question in those parts contrary to the second one, and grants letters testamentary to Eleanor Bowles, is annulled and reversed, and in other respects affirmed; the appellee paying the costs of the appeal.

Succession of Thomas E. Bowles—Alexander L. Field, Curator, Appellant.

The probate of a will is a judicial proceeding, and must be authenticated according to the act of Congress of 26th May, 1790.

The certificate of the clerk of a court in another State, that the transcript "is a true copy from the original filed in my office, as proven in open court, at the October term, 1841, and ordered by the court to be recorded," is not such evidence of the testament having been duly proved, before a competent judge of the place where it was received, as will authorize its admission to probate and execution in this State. It does not show how the will was proved, nor what was the order of the court. Duly certified copies of the orders or decree in relation to the proof and recording of the will, should have accompanied the transcript of the latter.

It is not enough that a clerk certify the result of the action of a court; he must make copies of what appears on the records, of which he is the keeper.

Appeal from the Probate Court of St. Mary, *Palfrey*, J.

Garland, J. Mathison presented his petition to the inferior court, representing that Thomas E. Bowles, late of the parish of St. Mary, had died in the State of Tennessee; that previous to his departure from this State he had made a testament, by public act, which had been admitted to probate and ordered to be executed, as will appear by the proceedings had on the petition of Eleanor Bowles, the wife of the petitioner, (*ante*, p. 31). It is further represented, that some time afterwards, Bowles left this State, and while residing in Tennessee made another will, which was duly proved and ordered to be recorded by a competent tribunal of the place where it was made, in which will the petitioner was named sole executor. He presents a copy of the will, and prays that it may be admitted to probate, its registry and execution ordered, and that he be confirmed as sole testamentary executor. Seven days after the filing of this petition, the court ordered the last will to be registered and executed, and that Mathison be con-

firmed as executor, on his giving bond and security according to law. From this judgment or order, Field, the curator of Dorothea Bowles, has appealed.

The appellant assigns various errors as apparent on the face of the record; but it is only necessary to notice one objection, which is that the order or judgment of the court in Tennessee, and the proceedings attending or preparatory to the probate of the will, have not been copied and duly certified. The certificate of the clerk, at the bottom of a copy of the will, states that "the above is a true copy from the original filed in my office, as proven in open court, at the October term, 1841, and ordered by the court to be recorded." We have heretofore said, that the probate of a will is a judicial proceeding, and must be authenticated according to the act of Congress. *Balfour* v. *Chew*, 5 Mart. N. S. 519. *Johnson* v. *Runnels*, 6 Mart. N. S. 622. The court in Tennessee no doubt made some order or decree in relation to the proof and recording of the will, and some proceedings were, of course, had, preparatory to the same. Duly certified copies of these should have been sent with the copy of the instrument. It is not sufficient that a clerk certify the result of the action of a court; he must send copies of what appears in the records, of which he is the keeper.

That has been omitted in this case, and we think the court below erred in receiving the copy, and ordering it to be registered and executed. Article 1682 of the Code says, that the order of execution shall be granted without any other form, if it be established that the testament has been duly proved, before a competent judge of the place where it was received; otherwise, the testament cannot be carried into effect, without being first proved before the judge of whom the execution is demanded. It does not appear in what manner the will was proved in Tennessee, nor what was the order of the court of Montgomery county. We, therefore, cannot say whether it was duly proved before a competent tribunal, or not.

The judgment of the court of Probates is therefore annulled and reversed, the order to register and execute the will of Thomas E. Bowles deceased, is set aside, and the case remanded for further proceedings according to law, with directions to notify the appellant of the time and place of any further proceedings to be had in

relation to the registry and execution of the testament; the appellee paying the costs of the appeal.

Dwight, for the appellant.

Maskell and *Lewis*, contra.

Succession of Thomas E. Bowles—Alexander L. Field, Curator, Appellant.

Notice must be given to the forced heirs, of any application to sell the property of a succession in which they are interested. It may be to their interest to prevent a sale, by furnishing the means necessary to extinguish the debts and legacies.

The heirs should be informed of every act of an executor or creditor, which may charge or materially affect the property of a succession.

An application by an executor for authority to sell a part of the effects of a succession, is in the nature of a rule to show cause; and it is only necessary that reasonable notice thereof should be given to the parties interested.

Appeal from the Probate Court of St. Mary, *Palfrey*, J.

Garland J. The appellee, Simon C. Mathison, executor of Thomas E. Bowles deceased, presented his petition to the Court of Probates, alleging that, after waiting the time required by law, he thinks from the amount of the debts made known to him, it will be necessary to sell a part, if not all of the property belonging to the succession, to pay the debts due by it, and effect a partition which had been prayed for by one of the parties interested. He prays that a sale be ordered, on such terms as shall be fixed by the parties interested, that Field be notified of the application, and be ruled to show cause why the property should not be sold. The Probate Judge ordered the petition to be notified to the parties interested therein. A citation issued accordingly, directed to Field, as curator of the forced heir of the testator. This appears from the record not to have been served on him; yet the court proceeded to give judgment, ordering a sale of the whole succession, to take place as soon as might be, after a family meeting could be held to deliberate on the terms and conditions. A family meeting was ordered in relation to the interests of the interdicted heir. From this judgment, Field, the curator, has appealed.

The appellant has assigned as errors apparent on the face of the record:

First. That no citation or notice of the application for a sale, was ever served on the presumptive heirs, nor on the appellant.

Second. That no judgment by default was taken, nor appearance made, nor issued joined.

Third. That the legal delay was not allowed, before judgment was rendered

Fourth. That there are no reasons given for the judgment.

We shall consider the three first objections together. Article 1660 of the Civil Code, makes it the imperative duty of the executor to have the presumptive heirs present, and the counsel for the absent heirs notified to attend at the taking of an inventory.

Article 935 of the Code of Practice requires in certain cases, (perhaps in all,) that notice be given to the presumptive heirs to attend at the opening and proof of a will. Notice must be given of the application to appoint a dative executor (18 La. 395); and we think very strong reasons exist, why the forced heir, at least, should be notified of an application to sell the succession in which he is interested. Article 1661 of the Code only authorizes a sale in default of funds to pay the debts and legacies; and a certain order is prescribed in which the property shall be sold, for that purpose. Article 1662 says that, except for the above named purposes, the executor cannot cause the immoveables and slaves employed on the plantation to be sold, unless authorized by the will. The heir should be notified of a deficiency of funds to pay the debts and legacies, as it may be in his power, and to his interest, to furnish the money necessary to discharge the demands on the succession, and prevent a sale. Other reasons might be given, why the heir should be informed of those acts of the executor or creditors, which materially affect the property, and sometimes entirely change its character.

It seems that the parties were aware in this case, that it was necessary to give notice of the contemplated proceedings, and that they were ordered by the judge to do so. Why the notice or citation which was issued, was not served on the appellant, is not explained. The error appears to be fatal.

The objection, that there was no judgment by default, or

delay afterward allowed, before rendering a judgment, we do not think entitled to any weight. Such applications as the one under consideration, are in the nature of a rule to show cause why the act should not be done. It is only necessary that reasonable notice should be given to the parties interested. We do not think that any default was necessary, or that useless delays should be allowed after the parties have been heard.

It is unnecessary to notice the fourth ground of error.

The judgment of the Probate Court is reversed, and the case dismissed with costs in both courts.

Dwight, for the appellant.

Maskell and *Lewis*, for the executor.

SUCCESSION OF THOMAS E. BOWLES—ALEXANDER L. FIELD, Curator, Appellant.

APPEAL from the Probate Court of St. Mary, *Palfrey*, J.

GARLAND, J. The appellee, Mathison, executor of Thomas E. Bowles, deceased, presented his petition, alleging that from the amount of the claims against the succession which he represents, and in consequence of the recommendation of a family meeting, held that day, touching the interests of Dorothea Carlin, the interdicted mother and forced heir of his testator, it is for the interest of all parties concerned, that a meeting of the creditors should be called, to deliberate on the terms and conditions of a sale of the property. He, therefore, prays that certain creditors, whose names he furnishes, may be cited for the purpose stated, and that a sale of all the estate may be made on the terms and conditions to be fixed by the creditors, so far as they are concerned, and that for the balance it may be on the terms specified, in a petition previously filed for a sale to effect a partition. On the 13th January, 1842, the day on which this petition was filed, the judge ordered that a meeting of creditors should be convened at a future day, in conformity with the prayer of the petition; and again ordered that a sale should be made of all the

property of the succession, on terms to be fixed by the creditors. From this judgment, Field, the curator of the forced heir, has appealed.

The only document or evidence that comes up with the record, is the petition of the appellee, asking for a partition of the succession between his wife Eleanor Mathison, the universal legatee, and her mother, the forced heir; and the judge certifies that this petition, and a list of names of certain persons stated to be creditors, are all the evidence on which the cause was tried.

The same errors were assigned as apparent on the face of the record in this, as in the case just decided, (*ante*, p. 35,) with the additional one, "that from the showing of the appellee, he has no right to institute the action of partition stated in his petition." This record exhibits no judgment on the petition for a partition. Having, in the preceding case, decided all the questions involved in this, against the appellee, on the ground of a want of notice, we must come to the same conclusion.

The judgment of the Probate Court of the 13th of January, 1842, is, therefore, annulled, and the petition dismissed with costs.

Dwight, for the appellant.

Maskell and *Lewis*, for the executor.

Louisa Field *v.* Simon C. Mathison, Executor.

The testator had bequeathed all his estate to his mother and one of his sisters. An order for a sale of the property having been procured by the executor, a sister of the deceased, to whom no part of the estate had been left, obtained an injunction to prevent the sale, and the curator of the testator's mother, an interdicted person, intervened in the suit, alleging that the latter was a forced heir recognized by the will, that the injunction was for her benefit as well as the plaintiff's, claiming part of the damages sued for, and praying to be allowed, with the consent of the plaintiff, to unite with the latter, and to pay a part of the costs. Answer by defendant to the petition of intervention, denying the right of the curator to intervene; and judgment dissolving the injunction and ordering the executor to proceed with the sale. On an appeal by plaintiff and intervenor: *Held*, that the plaintiff, having no interest in the succession of the testator, had no right to interfere with its administration: and that no judgment having been rendered for or against the intervenor in the lower court, his appeal must be dismissed.

Appeal from the Probate Court of St. Mary, *Dumartrait*, J.

Garland, J. The plaintiff, who is a sister of Thomas E. Bowles, alleges that she is entitled to a portion of his succession, which amounts to about $35,000; that Mathison, claiming to be the executor of her deceased brother, has taken possession of all the property, and obtained from the court two orders or judgments, decreeing a sale of the same, under which judgments, dated December the 29th, 1841, and January 13th, 1842, the property is advertised to be sold on the 21st of February, 1842. The petitioner alleges the nullity of these judgments or decrees of the Court of Probates.

First. Because she is a presumptive heir, and has had no notice of any of the proceedings upon which said judgments or orders have been rendered; she having never been cited, having never appeared or joined issue, nor had a judgment by default taken against her.

Second. Because there is nothing to show that the creditors of the estate demanded a sale.

Third. Because it does not appear necessary to sell the property to pay the debts of the estate.

Fourth. Because if it be necessary to sell any of the property to pay the debts, it is not necessary to sell the whole of it.

Fifth. On the ground that no property ought to be sold to pay the debts, until the proceeds of the sugar and molasses made on the plantation of the deceased, (which are not put on the inventory,) shall have been applied to that purpose.

She further alleges that the sale ordered should not take place, in accordance with the resolutions of the meeting of the creditors, as she has made opposition to the homologation of those proceedings; and, further, because the sale, if made in conformity to the decision of said meeting, will be a great injury to the estate.

She prays that the aforesaid orders or judgments directing a sale, may be annulled and declared void; and for an injunction against Mathison, and all others, to prevent a sale, saving to him the right of having so much of the property sold as may be sufficient to pay the debts of the succession; and she prays for damages, &c.

Upon this petition an injunction was issued, arresting all further proceedings.

The defendant, after a general denial, specially denies that the plaintiff has any interest in the estate of Thomas E. Bowles, as she is not named as a legatee in his will. He avers that the proceedings of the family meeting and meeting of creditors, have been duly homologated, and a sale ordered to pay the debts, which amount to about $14,000, mostly secured by mortgages, and that the sale has been illegally enjoined; wherefore, he prays for damages, for a dissolution of the injunction, that he may be directed to proceed to the sale of the property as if no injunction had been issued, and that he have judgment on the injunction against the plaintiff and her sureties.

On the day that this answer was filed, Thomas Maskell, the attorney of the respondent, presented a petition, alleging that he was, in a representative capacity, as curator of the estate of one Key, a creditor of the estate of Bowles; and that a sale had been ordered to pay his, and other debts. He asks leave to intervene in the suit, and says that the injunction ought not to have issued, and should be set aside.

First. Because the plaintiff has no right to it.

Second. Because the plaintiff has no interest in the estate until the debts are paid, although she may be a presumptive heir, which is denied.

Third. Because, as she could not interfere, he has suffered damages to a large amount. Wherefore he asks a judgment, dissolving the injunction, and for damages. On the same day Field, as the curator of Dorothea Bowles, presented himself, and asked to intervene and assist the plaintiff, alleging the same grounds of objection and nullity, and asserting that Dorothea Bowles was a forced heir, recognized by the will, that the injunction was for her benefit as well as the plaintiff's, and claiming a part of the damages sued for. He prays to unite with the plaintiff to pay a portion of the costs, and to share the benefits; to all which it is stated the plaintiff has agreed. This petition was answered by the defendant, but on that of Maskell no issue was ever joined.

After a protracted trial, the court dissolved the injunction, and

ordered the defendant, as executor, to proceed to a sale of the succession as if no injunction had been issued or attempt made to annul the judgments ordering a sale, which are declared valid and good in law. From this judgment, the plaintiff, and the intervenor Field, as curator, have appealed.

Dwight, for the appellants.

Lewis, contra. The plaintiff is without interest in the succession. She cannot interfere with its administration. The testator having disposed of all his property, her remedy, if any, was by an action of nullity to set aside the will. The intervention, being an accessory to the principal action, must share its fate.

Garland, J. On the trial of the cause, the two wills of Thomas E. Bowles, mentioned in the case of the *Succession of Thomas E. Bowles*, *ante*, p. 33, were given in evidence, and their validity or legal effect was not in any manner attacked, either by the pleadings or evidence. It is not pretended that these wills, or either of them, have been impeached in any legal manner; and from them, as they now stand, it is clear that Louisa Bowles has no right or interest in the succession of her deceased brother, he having, in express terms, given all his estate, real and personal, to his mother, and sister, the wife of the defendant. As long as these testaments stand, the plaintiff has no right to interfere in the administration of the succession of her brother. She is a collateral heir only, and the testator had a right to give his property to whom he pleased, so that the rights of his mother were preserved. The presumption of the plaintiff being an heir, is destroyed for the time being, by the will having instituted other persons as the universal legatees, or legatees by a universal title. Not having any interest in the case, the injunction was, therefore, properly dissolved.

The appellant, Field, insists that, although the injunction may have been properly dissolved as to the plaintiff, for want of interest, his appeal ought to be maintained, and he be permitted to assume the place of the plaintiff, and show the propriety and legality of the injunction, though originally no party to it, and although he had given neither bond or security to indemnify the defendant, nor made oath to the facts necessary to obtain it, because he had chosen to join her and claim a part of her alleged rights. Inde-

pendent of the objections that might be made to this assumption or transfer of litigious rights, there is one still more formidable as regards the appeal of the intervenor. There has been no judgment either for or against him, on his petition, in the inferior court. He is there still, and cannot, by hanging to the skirts of the plaintiff, get into this court and assert his rights under the protection of one whom we have already excluded.

The judgment, so far as it dissolves the injunction, is affirmed, at the costs of the plaintiff without prejudice to any rights which she may have on the estate of Thomas E. Bowles; and as to the intervenor, Field, as curator of Dorothea Bowles, his appeal is dismissed with costs.

SIMON C. MATHISON, Executor, *v.* LOUISA FIELD and another.

Where, through error, an order has been made allowing a suspensive appeal on security for costs only, and no transcript of the record has been delivered to the party, the order may be rescinded by the lower court on a rule to show cause.

APPEAL from the Probate Court of St. Mary, *Dumartrait*, J.

Maskell and *Lewis*, for the plaintiff.

Dwight, for the appellants.

GARLAND, J. The petition alleges that on the 1st of July, 1842, a petition and citation of appeal in the name of the defendants, were served on the petitioner, by which it appeared that they had taken a suspensive appeal, from a judgment of the court between the same parties, dissolving the injunction in the case of *Field* v. *Mathison, Executor*, just decided, (*ante*, p. 38,) on giving bond and security in the sum of $200. He represents, that this is not in compliance with articles 575, 576, and 577 of the Code of Practice, and alleges that the appeal is illegal, and ought to be set aside. He prays that the defendants in the rule, may be ordered to show cause why the suspensive appeal should not be set aside, or bond and security given as required by law.

The defendants except to answering the rule, on the ground that the court has no jurisdiction of the question, the Supreme

Court of the State being the only tribunal that can try the question, and decide whether the appeal was properly taken, or not; and ask that the rule be dismissed. On the trial, the court ordered the appeal to be set aside, so far as it is suspensive, unless the appellants should give bond and security in the sum of $3,500, within ten days from the date of its judgment. From this judgment, the defendants in the rule have appealed.

It appears that the judgment dissolving the injunction, was signed on the 15th of June, 1842, and a motion for a new trial overruled on the same day. The petition of appeal was presented, and the order granted by the judge on the 30th of the same month, and served on the appellee the next day. On the 2d of July, the application for the rule was filed, and served on the appellants on the 5th of the same month.* These are all the material facts of the case, but the parties have made up a record of about 150 pages, nearly all of irrelevant and useless matter, (as they have in two other cases, relating to the same estate,) with no other object, that we can discover, than to increase the costs.

As it respects the parties, the case is now not one of much importance; the plaintiff in the rule, and appellee in the other case, having succeeded in having his judgment affirmed as to one appellant, and the appeal dismissed as to the other. *Field* v. *Mathison*, *ante*, p. 38. But it is clearly a case in which the plaintiff was entitled, at the time, to some relief. The ten days allowed by article 578 of the Code of Practice, within which a suspensive appeal could be taken, had expired. The Probate Judge, from error or inadvertence, had, on an *ex parte* application, made an appeal suspensive, when he was forbidden by law to do so. The next day the plaintiff being notified of it, took measures as soon as possible to have the error corrected. The record and all the papers were still in the possession of the clerk. It does not appear that any transcript had been made out and delivered to the party, nor was the case filed in this court. The present is widely

* The rule was served on the same day, and the application for the rule was on the *eighth*, and not on the *fifth* of July. The record does not show that any notice of the judgment dissolving the injunction had been served on the plaintiffs in that case, previous to the time, (30th of June,) when their petition of appeal was presented.

different from any case that has heretofore come before us; and we are of opinion, under its peculiar circumstances, that relief should be extended.

Judgment affirmed.

SIMON C. MATHISON, Executor, *v.* ALEXANDER L. FIELD.

A partnership is dissolved by the death of one of the partners; and the property must be divided as soon as practicable, unless there be some stipulation to the contrary.

The representative of a deceased partner may take the necessary measures to protect the interest of the partner he represents; but he cannot administer the partnership affairs, unless authorized to do so by the contract of partnership.

APPEAL from the Probate Court of St. Mary, *Dumartrait*, J. GARLAND, J. Some years previous to the death of Thomas E. Bowles, of whose succession the plaintiff claims to be executor, he, with the consent of a family meeting, entered into a partnership with his interdicted mother, Dorothea Bowles, who was represented by a special curator for that purpose, in the business of sugar planting. The property belonged principally to the mother, but the son was to have the entire management of it during the partnership. It was stipulated that each should retain a title to the property put by them respectively into the partnership, and that the share of Bowles (the son,) should be four-ninths of the revenue, but no division of the revenue was to be made until the partnership debts were paid; and he was to render an annual account of the income and expenses to the parish judge. This partnership existed at the time when Bowles died, in the summer of the year 1841, when a crop was growing on the plantation. In August of that year, a family meeting of the relatives of the interdicted person was held, which recommended that the defendant should be appointed her curator in the place of her deceased son and partner; and, in relation to the property, advised that the whole should remain together, until the crop was made up, or until the 1st of January, 1842, in possession of Mathison's wife, who was then acting as executrix of her brother's (Thomas E.

Bowles') succession, when ten hogsheads of sugar, under the direction of a special curator, should be sold and the proceeds applied to the expenses of the plantation, if they amounted to so much; the remainder of the crop of sugar, molasses, and corn, then to be divided in the manner agreed on in the contract of partnership, between Field, the curator of Dorothea Bowles, and the executrix of Thomas E. Bowles. The former was then to take possession of all the property of his ward. These proceedings were homologated by the Probate Court, and Mathison's wife proceeded to act under them for some time. Having attempted to remove or dispose of some of the sugar, she was arrested by a sequestration, obtained by Field, and twenty-five hogsheads were taken possession of by the sheriff, and bonded by her. This suit was dismissed at the plaintiff's cost, and Mathison, who had become executor, was decreed to retain possession of the sugar. On the 6th of January, 1842, another family council was held, at the instance of Mathison, or in consequence of his proceedings, and among other things, they advised that the crop of sugar should be divided in kind, in the proportions fixed by the act of partnership, and prescribed the mode in which the lots were to be drawn. Mathison had previously presented a petition, praying, on behalf of himself and his wife, for a partition, and asking it to be effected by a sale. These proceedings were homologated in the same manner as the first, and Mathison makes them immediately the basis of an application for a meeting of creditors, to fix the conditions of a sale of his testator's property.

In obedience to the advice of the family meeting, and the confirmation of their proceedings by the court, the judge gave Mathison notice, that he should, on a day fixed, proceed to make the partition in kind between him and the defendant; whereupon Mathison presented his petition, praying the judge to arrest the execution of the judgment of partition, alleging: *First.* That the family meeting had assumed powers not authorized by law, as they had ordered and decreed, that a judicial partition of the crop of sugar and molasses belonging to the partnership, should be made in kind.

Second. That the proceedings are illegal, unjust and oppressive, and were "got up" for the purpose of depriving him of the legal

possession of the sugar and molasses, and of his right to dispose of the same, and of rendering his account, according to the act of partnership.

Third. That the partition would deprive him of the possession and enjoyment of the property; all of which he alleges to be to his damage $500.

He then sets forth the pendency of the suit for a sequestration, an application made by Field on the day of the family meeting, (6th January, 1842,) for a partition, of which he says he had no notice, and finally avers, that no judicial partition of the sugar and molasses can be made in kind, but that the same must remain in his possession, that it may be disposed of by him, and an account rendered, as was done by his testator.

In addition to the prayer for an injunction, the plaintiff asked that he might be decreed to be the lawful possessor of the sugar and molasses; to be authorized to sell the whole of it; and to account for the proceeds as executor of the deceased partner.

After hearing the parties, the court made the injunction perpetual, and decreed the plaintiff to be "the true and lawful owner and possessor of the crop of sugar and molasses belonging to the partnership, as by him claimed; that a writ of possession issue immediately; and that the crop be sold by the plaintiff and accounted for, as had been previously done by the deceased partner." From this judgment the defendant has appealed.

We are of opinion that the judge erred. He exceeded his jurisdiction in undertaking to decide upon the ownership of the property; and, after examination, we see no ground for the injunction.

The first ground alleged by the plaintiff, is unsupported by the facts. The family meeting was convened to deliberate and advise "upon the interest of said interdicted, as connected with the succession of the late Thomas E. Bowles." They assumed no authority, nor did they give any judgment of partition; they advised what was best in their opinion, and recommended a partition of the crop in kind. The plaintiff, in his petition, filed December 15th, 1841, asked for a partition of the estate held in common between his wife and her mother, and asked that the defendant

might be cited to show cause why it should not be so decreed. In his petition for the injunction he says, that the defendant had prayed for a partition of the sugar and molasses in kind; which he seems to think very improper. The Court of Probates, by homologating the deliberations of the family meeting, and not *that* body, gave the judgment of partition.

As to the second allegation, we see nothing illegal or unjust in the proceedings. If they were instituted for the purpose alleged, the plaintiff is, in a great degree, the author of the mischief. He was the first to seek a partition. He preferred a sale to effect it; but his wishes and interest are not to control all others, and if a partition deprives him of the possession of five-ninths of the sugar and molasses, it only takes from him that to which he has no right.

The third allegation is answered by what we have said on the second.

As to the fourth allegation, we are unable to discover why sixty-eight hogsheads of sugar and a quantity of molasses, cannot be divided in kind; and the plaintiff has given no other reason why it cannot, or ought not to be so divided, than that it will deprive him of five-ninths of the property, and prevent him from getting the proceeds into his possession. He is entirely mistaken in supposing that he has the same rights over the partnership property that his testator had. The partnership was dissolved by the death of one of the partners, (Civ. Code, arts. 2851, 2852,) and the property must be divided as soon as it can be, unless there be some stipulation to the contrary. Ib. art. 1137. There might be some plausibility in a surviving partner, or his legal representative, claiming the possession and right to sell the partnership property, and the Code (arts. 1131, 1132,) authorizes it under some circumstances and upon conditions which are stated; but the assumption that the representative of the deceased partner can, at his pleasure, take the ownership and possession of the partnership property from the survivor, is unsustained by reason or authority. The representative may take the necessary measures to secure the interest or share of the partner he represents, but he cannot administer the partnership affairs, unless authorized to do so.

The judgment of the Court of Probates is annulled, and the injunction dissolved; the plaintiff paying costs in both courts.

Maskell and *Lewis*, for the plaintiff.

Dwight, for the appellant.

JOACHIM KOHN and another, Syndics, *v.* JONAS MARSH.

Petition by the syndics of an insolvent for a division of partnership property by sale. Four experts having been appointed, by consent, to report whether the property could be divided in kind, without loss or inconvenience, and two only having reported, on motion of plaintiffs the order appointing experts was rescinded, and the court proceeded to receive other evidence of the facts intended to be established by their report. *Held*, that the report of the experts was not the only mode of proof to which the court might resort, to enable it to decide whether the property should be sold; and that, under art. 1261 of the Civil Code, any other legal evidence might be received.

Any consent given, or admission made on record, by a party, in the progress of a suit, from which his adversary may derive any legal right, cannot be withdrawn without the consent of the latter, who is entitled to the benefit of its full legal effect. *Aliter*, where such consent or admission confers no right, as where experts have been appointed, by consent, to ascertain a fact, in which case either party may move to rescind the order, or it may be done by the court *ex officio*.

Where, in an action for the settlement of a partnership, the property is such as cannot be divided in kind without loss or inconvenience, a sale may be ordered at once, without waiting for the settlement of the partnership accounts.

APPEAL from the District Court of St. Martin, *King*, J.

Voorhies, for the plaintiffs.

I. E. Morse, for the appellant.

SIMON, J. The defendant is appellant from a judgment ordering the sale, at public auction, of a plantation and slaves belonging to the partnership heretofore existing between himself and John F. Miller, whose syndics have instituted the present action with a view to obtain a partition and settlement thereof.

The pleadings show that after this suit was put at issue, an order was rendered by the inferior court, appointing a notary to make an inventory of all the property in partnership, and referring the settlement of all the accounts set up by the partners against each other, and against the partnership, to three auditors. This

first order was followed by another, rendered by consent of parties, appointing four experts, for the purpose of reporting whether the plantation and property specified in the inventory, could be, without loss or inconvenience, divided, in kind, into two lots. At a subsequent term of the District Court, two of the experts only made a report, and gave it as their opinion that the property inventoried could not be divided in kind, without great inconvenience or loss, or a diminution of its value. After the filing of this report, the case was taken up, and the court permitted the plaintiffs' counsel to produce evidence to prove the facts intended to be established by the report of the experts. This was excepted to by the defendant's counsel. The evidence, however, was admitted, after the order appointing the experts had been rescinded on motion of the plaintiffs' counsel, to which the defendant's counsel had previously excepted, on the ground that the order appointing experts having been rendered by consent of parties, the same could not be rescinded without their consent.

After the evidence was closed, the plaintiffs' counsel moved the court to order an immediate sale of all the partnership property to be made at public auction, in order to effect a partition thereof, to which motion the defendant's counsel objected, on the ground that there were long and intricate accounts unsettled between the parties, which accounts had been referred to auditors, who had not yet reported thereon, and that a sale could not be legally ordered until the accounts should have been settled and liquidated, and the balance between the parties ascertained. These objections were overruled by the judge *a quo*, who sustained the plaintiffs' motion, and ordered the sale accordingly. To this opinion, the defendant's counsel excepted, and from the interlocutory judgment rendered thereon, he took the present appeal.

The first question to be decided in this case, grows out of the defendant's bills of exception. It is whether the inferior court could properly and legally rescind the order appointing experts, and permit the plaintiffs to introduce evidence to prove the facts sought to be established by the report of the experts; or, in other words, whether the report of the experts, legally made, was not the only proper evidence of the fact intended to be proven in this case.

Art. 1261 of the Civil Code provides, that "when the property to be divided is indivisible by its nature, or when it cannot be conveniently divided, the judge shall order, at the instance of any one of the parties, on proof of either of these facts, that it be sold at public auction, &c." From the words of the law, it appears to us manifest that the report of experts is not the only mode which may be resorted to, to bring to the knowledge of the court the facts upon which the judge is to decide, whether there shall be a sale of the common property or not. The only object of the law is, to afford to the court sufficient means to ascertain the circumstances upon which its decision is to be based, and it matters not by what kind of proof the knowledge of such facts is acquired, provided it be by legal evidence. It is clear that, as soon as the judge is made legally acquainted with the true nature and state of the common property, it is his duty to order a division thereof according to the best interests of the parties, and in the manner pointed out by law; and we are unable to see any reason why he should be obliged to delay his judgment, until a report is made by experts, when the same result or proof can be reached by other and equally sufficient evidence.

But it is contended that, in this case, the experts were appointed by consent of parties; that such consent cannot be withdrawn; and that their report was, consequently, to be used as the only proper and legal evidence of the facts sought to be established. It is true that the order in question was rendered by consent, and that two of the experts had acted and made a report agreeing with the evidence which was subsequently introduced by the plaintiffs. The order appointing experts was rescinded by the court on the motion of the plaintiffs, who, thereby, withdrew the consent they had previously given. It is a well known and established rule that where one of the parties to a suit gives a consent or makes an admission on record in the course of the suit, from which certain legal rights may be derived in favor of his adversary, he cannot subsequently withdraw such consent or admission; and that the other party is entitled to the benefit of their full and legal effect. In this case, we are at a loss to conceive how the defendant could be said to have acquired any legal right from the consent of the plaintiffs to the appointment of experts for the purpose of proving

a fact. The withdrawing of such consent could not, in any manner, be injurious to his interest; it only went to selecting one mode of proof instead of another. It cannot be construed as a waiver or renunciation of any legal right; and we know of no law by which the plaintiffs could be bound to resort to one kind of proof in preference to another, or which would preclude them from introducing the whole of their evidence, if legal, or from selecting such parts of it as they thought proper. If the mode of proof, originally consented to by the plaintiffs, was afterwards found to be inconvenient or insufficient, they were at liberty to withdraw their consent, and to move the court to rescind the former order, no legal right having been thereby acquired by their adversary. The district judge himself could have done it, *ex officio*.

The main point, however, which this case presents, and which has been ingeniously and strenuously urged by the defendant's counsel, is, that no sale of the common property could be ordered, before the accounts between the parties against each other and against the firm were settled and liquidated. We have attentively considered this question, and have found no difficulty in coming to a conclusion adverse to the appellant's pretensions. The object of this suit is a settlement and partition of the partnership formerly existing between the parties. In order to arrive at a final liquidation of it, it is necessary, since the property cannot be divided in kind, that the whole of it should be converted into money, not only to satisfy the debts, but also to divide the proceeds of the sale between the partners, according to their rights against the firm, and to the portions to which they may be entitled respectively. How could a fair settlement and final liquidation be made, if the amount of the assets or credits of the partnership are left unknown? These are mainly to be taken into consideration by the auditors or by the notary; and it would be vain to say that there should be a provisional settlement made before selling; that the sale should be delayed until the balance due to, or by each of the partners should be ascertained; and that a final liquidation should take place subsequently. *No one can be compelled to hold property with another* (Civ. Code, art. 1215); and it would often happen that, by the delay which the settlement of the accounts of the partners would necessarily occasion, this rule of law would

become vain and nugatory. This, our law does not seem to have ever contemplated. On the contrary, from the different provisions of the Code on the subject, it is evident that the intention of the law maker was to include in the settlement or liquidation all the objects concerning the partnership, and all the property belonging thereto, or the proceeds of such as it was necessary to sell to effect a partition. Art. 1278 of the Civil Code says, positively, that the *active mass* shall be composed "*of the price of the moveables, slaves, and real estate which have been sold to effect the partition.*" From this article, as well as from article 1272, and particularly from the words of articles 1265 and 2603 of the Civ. Code, we cannot hesitate to say, that before ascertaining what balance there may be in favor of or against the partners respectively, it is required that the property which cannot be divided in kind, should be first sold and converted into money, so that the proceeds thereof may be included in the *active mass.* This appears to be the true meaning of our law on this subject.

We think, therefore, that the judge *a quo* did not err in ordering the sale of the common property in this case; and that, as directed in the judgment appealed from, the proceeds thereof should not be divided between the parties, until a final settlement and liquidation of their accounts be made, and their portions ascertained by a partition made under the control of the inferior court.

Judgment affirmed.

ANNE PERRETT and Husband *v.* ANTOINE DUPRÉ and others.

A lessor is bound to keep the premises in a condition fit for the purposes for which they were leased. If he fail to make the repairs necessary during the lease, the tenant may make them himself, and deduct the amount from the rent.

The lessor is bound to indemnify the lessee, for all damage sustained by the latter in consequence of the vices and defects of the thing leased, though the lessor knew nothing of the existence of such vices and defects at the time of the lease, and even where they have arisen since.

Where, after the commencement of a lease, the house becomes so much injured as to

be incapable of being rendered fit for the purposes for which it was leased, otherwise than by rebuilding it, and the lessor offers to dissolve the lease, which the lessee refuses, and continues to occupy the building: *Held*, that the lessor will not be responsible for any damage subsequently sustained by the lessee in consequence of the condition of the building, and that the latter will not be entitled to claim any diminution of the rent for the period he continued to occupy the premises after the offer of the lessor to annul the lease.

In an action for the rent of a building occupied as a shop by a commercial partnership, the judgment must be against the lessees *in solido*.

APPEAL from the District Court of St. Landry, *King*, J.

MORPHY J. At the last September term, this court affirmed a judgment, decreeing the defendants to pay two instalments of rent due to the plaintiffs for a brick store and out-houses leased to them in the town of Opelousas, and pronouncing a dissolution of the lease. See 19 La. 343. The plaintiffs, in two suits, which have since been consolidated, now claim the three semi-annual instalments, which became due from the 15th of September, 1840, to the 15th of March, 1842. The defendants aver that the lease under which the plaintiffs, claim has been annulled; that the plaintiffs have not complied with the terms of the lease, and have not kept the property in such a condition as they were bound to do; that part of the premises consists of a large brick house, which has always been used as a store, and in which they always had a large stock of goods on hand; that without any fault of theirs, the house has for a long time been in a state of decay and dilapidation, the walls and roof being cracked in many places, so that the rain and wind pass freely through, whereby the goods in the store have been injured to the amount of $1000. They aver that they gave notice to the plaintiffs of the deterioration of the house, and requested them to cause it to be repaired, which they have neglected and refused to do; that by reason of the said cracks the house has lost much of its usefulness and value, and has not been so well fitted for the use for which it was leased as it was before; that the plaintiffs, by failing to repair the house as they were bound to do, are liable to suffer a diminution of rent to the amount of $500 per annum, and to pay $1000 damages. There was a judgment below, in favor of the plaintiffs, for $1415, and the defendants have appealed.

The facts of this case are materially the same as those pre

sented by the record in the first suit, very little additional evidence having been introduced.

It is undoubtedly the duty of the lessor of a house to keep and maintain it in a condition to be used for the purpose for which it is leased; if he fails to make all necessary repairs during the continuance of the lease, the tenant is, by law, authorized to cause them to be made himself, and to deduct the amount expended in making them, from the rent due. It is equally true that the lessor is bound to indemnify the lessee, for all damages sustained by the latter in consequence of the vices and defects of the thing leased, even if he knew not of the existence of such vices and defects at the time the lease was made, and even when they have arisen since. Civ. Code, arts. 2662, 2664, 2665. But in the present case it is proved that the house leased was in such a situation as not to be susceptible of being repaired. The opinion of the workmen, consulted by both parties to this suit, was, that the house must be pulled down and entirely rebuilt, as the foundation had given way and sunk, and the walls had cracked in several places. As soon as the impracticability of repairing the house was ascertained, a dissolution of the lease was tendered to the defendants; but they refused it, and continued to occupy the premises. Though the house had really become unfit to be used as a store, yet, as it was known to the defendants that it could not be repaired, and that they were at liberty to leave it, they complain with bad grace, of having suffered damages which it was in their power to avoid. But the evidence shows that the loss of the defendants, if they suffered any at all, was extremely small. One of the defendants' clerks testifies, that some goods in a small room below were injured by the leaking of the house, but they did not sustain much damage, as he was always careful to remove them; that he supposes the damage to have been about twelve per cent; that there might have been about $300 worth of goods on the side of the room where the leak existed; that a quantity of stockings and socks were wet, &c. On the last trial, no attempt was made to prove any other damage to the stock of goods in the house; and that spoken of by this single witness, appears to have been sustained after the defendants had refused

to leave the house. *Volenti non fit injuria.* It appears from the whole testimony that there was more apprehension entertained by the tenants and their clerks, lest the house should fall over their heads, than real inconvenience felt or injury sustained from the crazy condition in which it was.

As to the diminution of rent claimed by the defendants for the time they continued to occupy the premises, after the plaintiffs' offer to annul the lease, we do not think them entitled to any. They clung to the possession of the property as long as it suited their convenience, and, by appealing from the judgment dissolving the lease, put it out of the power of the owners to oust them before the judgment was affirmed in September last. It was only a short time after, that they surrendered the premises. Having thus withheld the property, by suspending the effect of the judgment dissolving the lease, and continued to use it as before, they should, in our opinion, continue to pay the same rent. The appellees have prayed for an amendment of the judgment, which they contend should have been joint and several against the defendants, who are commercial partners.

It is, therefore, ordered, that the judgment appealed from be amended, so as to be rendered joint and several against the defendants; and that it be affirmed, with costs, in all other respects.

Swayze and *Taylor*, for the plaintiff.

T. H. Lewis and *W. B. Lewis*, for the appellants.

THE STATE *v.* BENJAMIN F. LINTON.

The penalty imposed by the eighteenth section of the act of 7th June, 1806, on the owner or occupier of a plantation, for keeping slaves thereon, without a white or free colored person as manager or overseer, can only be recovered by civil action before an ordinary tribunal. The action must be brought before a Justice of the Peace, a Parish, or District Court, according to the number and amount of the fines claimed. Where the act which imposes a fine prescribes that it shall be recovered by a civil action, the officers of the State cannot, by instituting a suit in the form of an indictment, deprive the party of the right of appeal to the Supreme Court.

INDICTMENT stated that Benjamin F. Linton, was the owner of

a plantation in the parish of St. Landry, on which he had kept a certain number, to wit, ten slaves, since the 1st of January, 1841, till that time, (November, 1841,) without having any white or free colored person as manager or overseer of such slaves, contrary to the form of the statute, &c. Plea, not guilty. The evidence established the allegations of the indictment; and the District Court of St. Landry, *King*, J., gave judgment against the defendant for fifty dollars, and the costs of the prosecution.

Martin, J. The defendant is appellant from a judgment on an indictment under the 18th section of the act of the 7th of June, 1806, (1 Moreau's Dig. 118,) which provides that, "no person occupying, or being owner of a plantation, shall be permitted to keep such* slaves on his plantation, without having a white, or free colored man as manager or overseer, under the penalty of fifty dollars for every month elapsed without complying with the provisions of this section."

We have not been favored with any of the grounds, upon which the hope of redress at our hands is entertained. We have not discovered any, except in the 21st section of the act, which declares that all the fines in the act "which have not been appropriated or the recovery of which has not been regulated, shall, if they do not exceed twenty-five dollars, be enforced, levied, and seized upon, by warrant of a justice of the peace of the county where the said offence shall have been committed, and provided the said fine exceeds the sum of twenty-five dollars, the said fine shall be recovered before a competent tribunal." The penalty prescribed by the 18th section is not appropriated or regulated by any other part of the act. We assume that the words *penalty* and *fines*, in these two sections are, used synonymously. It, therefore, follows, that the legislature has declared its intention that the recovery should not be had by a prosecution on an indictment, but by a suit or ordinary action before a competent tribunal. That is to say, before a Justice of the Peace, a Parish Court, or a District Court, which are respectively competent tribunals, according to the amount or number of the fines claimed; a prosecution by indictment

* *Id est, any*, the act providing for the punishment of offences committed by any slaves.

being clearly excluded, as there is but a single tribunal in the parish in which a grand jury is empanelled. The claim of the State ought, therefore, to have been enforced by a civil suit. As this court has jurisdiction of all civil suits, the officers of the State have no right, by instituting a civil suit in the form of an indictment, to deprive a citizen of the resort to this court, to which he would be entitled if the suit were brought in the mode prescribed by the act which denounces the fines.

The proceedings were clearly erroneous. It is, therefore, ordered that the judgment be annulled, reserving to the State her rights, according to the mode pointed out by law.

T. H. Lewis, District Attorney, for the State.

Linton, pro se.

AMOS T. DWIGHT and others *v.* BENJAMIN F. LINTON.

An accommodation endorser, must be viewed in the light of a surety, and as such is entitled to discuss the property of his principal.

Discussion, like other dilatory exceptions, must be pleaded *in limine litis*. It cannot be received after issue joined.

Where a commission to take testimony has been duly executed, and returned into court, either party may use the evidence taken under it; and this right is not waived, by omitting to cross-examine the witnesses.

Art. 2256 of the Civil Code, which provides, that parol evidence shall not be received against or beyond what is contained in written acts, is inapplicable to a case where the defendant offers witnesses to prove that the endorsement of a note was merely as security, and that it was to be paid out of collections to be made by him from claims due to the drawer. The evidence neither explains, nor contradicts the written instrument, but goes to establish a collateral fact or agreement in relation to it.

APPEAL from the District Court of St. Landry, *Boyce*, J. The plaintiffs sue as endorsees of a promissory note made by Andrus & Harman, payable to the order of the defendant, and by him endorsed to the plaintiffs. Petition filed 13th April, 1840. On the 3d of June following, the defendant answered, that the plaintiffs had large claims against the commercial firm of Andrus & Harman, for whom he was acting as attorney; that he endorsed the

note as such, having received no consideration therefor, and with the express understanding that the amount was to be paid from collections to be afterwards made by him out of debts due to the drawees; and that Andrus, one of the drawers, had since died, leaving both real and personal property in the parish, sufficient to satisfy the debt. He prayed for discussion of the property of the firm, and of the succession of the deceased partner; and propounded interrogatories to two of the plaintiffs, to establish the allegations in his answer. On the 28th November, 1840, the court ordered the interrogatories to be answered by the first day of the succeeding term. At the May term following, the defendant presented a list of property to be discussed, consisting of various notes and judgments belonging to the drawers, and including the property of the succession of Andrus, and moved the court to fix the amount necessary to carry on the discussion, which motion was overruled on the ground that he was not entitled to the benefit of discussion. The defendant excepted to this opinion; and in the course of the trial took two other bills of exception, noticed in the opinion of the court, *infra*. Two of the plaintiffs who were interrogated, answered, that the note was not given for any debt due to them by the defendant, but for a debt of Andrus & Harman; that it was taken by one George A. Trowbridge, who acted as their agent; that they knew nothing of the circumstances under which it was given, but from him; and that, from his statements, they are satisfied that there was no such understanding as to the mode of its payment as the defendant alleges. G. A. Trowbridge testified that he acted as agent for the plaintiffs; that the defendant endorsed the note to secure its payment, and that there was no condition attached to the endorsement; that the note was for a debt due by Andrus & Harman; and that he knows nothing of any such understanding, or agreement, as that alleged by the defendant. Judgment for the plaintiffs.

Martin, for the plaintiffs. An endorser cannot plead discussion. 2 Mart. 353. 11 Ib. 434. 1 Ib. N. S. 478. Civ. Code, 3014. Parol evidence is inadmissible as a substitute for a written instrument (3 Starkie, 998–9); or to contradict it (Ib. 1002, *note s*); or to show what was said at the time of its execution (1 Mart. N. S.

640. 2 Ib. 361. 3 Ib. 692. 3 Starkie, 1005); or to add to it (3 Ib. 1006–7–8); or to alter its legal effect. 3 Ib. 1008–9.

I. E. Morse, contra. The judge, *a quo*, erred, in rejecting testimony to show that the note was to be paid from collections to be made by the defendant; in refusing him the benefit of discussion; and in permitting the plaintiffs to read the evidence taken under a commission by defendant, they having refused to propound any cross interrogatories, and the defendant having declined to use it. The authorities from Starkie, cited by the counsel for the plaintiffs, apply to negotiable paper in the hands of third persons.

Morphy, J. The defendant, endorser of a note drawn by Andrus & Harman, has appealed from a judgment decreeing him to pay its amount. He has called our attention to three bills of exception, taken during the progress of the trial.

I. The defendant moved the court to fix the amount, necessary to carry on the discussion of certain property he had pointed out as belonging to the drawers. This the judge refused to do, on the ground that he was not entitled to the benefit of discussion. The motion was in our opinion properly overruled, but not for the reason assigned by the judge. An accommodation endorser, such as the evidence shows the defendant to have been, must be viewed in the light of a surety, and, like other sureties, is probably entitled to discuss the property of his principal. The motion should have been overruled, because the plea of discussion came too late. The defendant offered it about one year after his answer had been filed. Like all other dilatory exceptions, it must be set up *in limine litis*, and cannot be received after issue joined. Code of Prac. arts. 332, 333. Civ. Code, art. 3015. 1 Pothier Oblig. p. 316, No. 411.

II. The judge properly overruled the defendant's objection to the plaintiffs offering in evidence testimony obtained under a commission taken out by him, on the ground that as they had declined to putting cross interrogatories, the testimony was his, and could be used only by himself. When a commission duly executed is returned into court, either party may use the testimony taken under it, and he does not lose this right by waiving that of cross-examining his adversary's witnesses.

III. The defendant offered two witnesses to prove that his en-

dorsement on the note sued on, was merely as security, and that the same was to be paid out of collections to be made by him of claims due to the drawers, Harman & Andrus, and particularly out of a note due by Redmond & Harper, for about $1700, in his hands. The court refused to hear these witnesses, being of opinion that parol evidence could not be received to change, or modify a written contract. We think that the court erred. We have repeatedly held, that the article of our Code which provides that parol evidence shall not be received beyond, or against the contents of a written act, is inapplicable to a case of this kind. The evidence offered was neither to contradict nor explain a written instrument, but to prove a collateral fact or agreement in relation to it. 12 Mart. 402. 1 Ib. N. S. 90. 2 Ib. N. S. 122. 3 Ib. N. S. 268. But even had these witnesses been heard, and had they testified to the agreement relied on by the defendant, their testimony would have been outweighed by that adduced against him. Their evidence might have destroyed the proof resulting from the answers of the plaintiffs to interrogatories propounded to them by the defendant, in which they denied the existence of any such agreement; but there would still remain the testimony of George A. Trowbridge, one of the defendant's own witnesses, who was the person who received the note for the plaintiffs, and who positively denies that any condition was attached to the endorsement, which was given as an ordinary accommodation endorsement.

Judgment affirmed.

William Moore v. John Rutherford.

Action, by the transferree of instalments due for the price of land. Defendant pleaded a deficiency in quantity, claimed a diminution of the price, and prayed that his vendors might be made parties, and condemned to refund a portion of the amount already paid. Judgment for the plaintiff, and appeal by defendant, the plaintiff alone being cited. *Held*, that the vendors stood towards the defendant in the capacity of plaintiffs, and should have been made appellees; and that the appeal must be dismissed for want of proper parties.

APPEAL from the District Court of La Fayette, *King*, J.

Action by the plaintiff, as transferree of certain instalments due for the price of "one hundred and six *arpens* of prairie land, and twenty *arpens* in the *commune* of prairie Sorrel, besides the wood-land belonging to said land in the concession of prairie Sorrel, with the buildings and improvements thereon," &c.

Voorhies, for the plaintiff.

Crow and *Porter*, contra.

SIMON, J. Plaintiff sues to recover the balance due on the price of a tract of land, sold to the defendant by one Eloy Landry and his wife, in virtue of a transfer or assignment of the debt, made to him by the vendors.

The defendant first pleads the general issue, and alleges that he purchased the land, for the price of which the present suit is brought, from Eloy Landry and his wife, as containing one hundred and six *arpens* of prairie land, and twenty superficial *arpens* of wood-land; that previous to the sale, his vendors had applied by petition to the court to grant an order of sale for a part of said land, and that after said sale, the vendors prosecuted their petition to a final judgment, and sold at public auction all the wood-land already conveyed to the defendant. He further avers that there is a deficiency in the number of *arpens* of prairie land, of about forty-five superficial *arpens*. He avers that he is entitled to a diminution of the price, to the amount of $2000; that, therefore, he is not indebted to the plaintiff in any sum, and that his vendors are on the contrary indebted to him, in the sum of $1200, out of the amount they had received previous to the transfer. He prays that Eloy Landry and wife be made parties to the suit; and that they be ordered and condemned to deliver to him the quantity of land by them sold, or, in default thereof, to pay him the sum of $1200.

Landry and wife appeared and filed an answer, in which they state that they adopt as their own all the plaintiff's allegations; that they are true and correct; and that said plaintiff is entitled to recover of the defendant the amount by him claimed. They further aver that the tract of wood-land was sold by licitation among the co-proprietors, in consequence of a suit which had been instituted for that purpose; that the defendant was made a party to

said suit, and acquiesced in the judgment therein rendered; that the proceeds of the sale were divided among the owners; and that the defendant was classed as one of them on the tableau made by order of the court.

On these pleadings, the parties went to trial, and judgment having been rendered in favor of the plaintiff, the defendant has appealed.

Although, from the disposition we have concluded to make of this case, it is not our intention to express any opinion on its merits, we cannot forbear remarking that the record shows flagrant inconsistency between the allegations of the defendant, and his own acts after the institution of this suit. His answer was filed on the 9th of November, 1841, and on the 13th of the same month he paid to the plaintiff a sum of $248, *on account of the amount due him* in the suit, without any reservation. After having thus acknowledged the legitimacy of the plaintiff's claim; after having done an act which shows that the defence set up against his adversary's demand, was at least partly, if not totally unfounded; how can he seriously pretend before us, as alleged in his answer, that the plaintiff is not entitled to recover any part of his demand, and that Landry and wife were bound to reimburse him a part of the price by them received?

However this may be, we have come to the conclusion that this appeal cannot be maintained. Landry and wife having been made parties to this suit by the defendant, they joined the plaintiff, to sustain the demand set up by him in virtue of their transfer, and answered to the averments contained in the defendant's answer as against themselves. For aught we know, they were represented by counsel, on the trial before the District Court, and this we ought to presume, as there is nothing in the record going to show that they were dismissed from the suit, or that the defendant ever abandoned the claim set up by him against them. It is true that the judgment appealed from does not make any mention of the defendant's warrantors; but this was unnecessary, since the plaintiff had succeeded. Landry and wife having joined the plaintiff to sustain his demand, and give effect to their transfer, stood towards the defendant in the capacity of plaintiffs; and it was his duty to have made them appellees, and to have had them regularly cited

to appear before this court and answer to his appeal. 12 La. 271. Not having done so, we think this case cannot be proceeded upon before us in the absence of two of the parties; and that the appeal should be dismissed.

Appeal dismissed.

EDMUND W. TIPTON, Agent, *v.* BASIL C. CROW.

Where the amount fixed by the judge for the appeal bond, is less than that required by law to render the appeal suspensive, it will be good as a devolutive one; the bond, in the latter case, being only to secure the payment of the costs.

APPEAL from the District Court of La Fayette, *King*, J.

Voorhies, for the appellant.

Crow, propria persona, and *Porter*, contra.

SIMON, J. The plaintiff's claim is founded on an appeal bond, subscribed by the defendant as security, for the sum of $300, and given in a suit in which, judgment having been rendered in favor of the plaintiff against one J. B. Mudd, curator of the estate of E. B. Mayfield, the latter took an appeal which was brought up before this court. 10 La. 189. The judgment appealed from, and affirmed by this court, was for the sum of $1278 56, with interest. Plaintiff's claim is also founded upon the alleged fact that a blank sheet of paper signed by said J. B. Mudd, one P. M. Wilkins, and the defendant, was found among the papers of the estate of Mayfield, deposited in the office of the parish judge of the parish of La Fayette, which was intended to be filled up with a bond to be given by the said curator, for the surety of his administration as such. It is alleged that the defendant signed it as the security of J. B. Mudd, and that the said blank sheet of paper, so signed, ought to have the effect of a regular curator's bond, and that it is as binding upon the securities as though the same had been written out in full. Plaintiff prays that the defendant may be condemned to pay him the amount of the judgment affirmed by this court, after deducting the credits to which the defendant may be entitled, for payments made since the judgment.

Issue having been joined by the defendant, who avers in his answer that he never became security for Mudd as curator of the estate of Mayfield, and that he is not bound or liable to the plaintiff as by him alleged in his petition, the latter thought proper to probe the defendant's conscience, and to propound to him interrogatories in order to ascertain the circumstances under which the blank sheet of paper was signed. The purport of the defendant's answers to the interrogatories is, in substance, that, the sheet of paper in question bears his signature, but that he cannot say for what purpose it was so signed, and that he never considered himself security of Mudd as curator of Mayfield's estate.

There was judgment below in favor of the plaintiff for sixty dollars, from which he has appealed.

First. The order of appeal granted in the suit in which the appeal bond sued on was given, requires the appellant to give security in the sum of three hundred dollars, although the judgment appealed from was for a much larger sum; and this court has often decided, that where the judge directs an amount for the bond less than that required by law for a suspensive appeal, it will be good as a devolutive one. 5 La. 129. The appeal was, therefore, merely devolutive, and in such case, the object of the bond is to secure the payment of the costs only. Code of Pract. art. 578. The defendant in this suit cannot, consequently, be bound for more than the costs, which have been shown to amount to sixty dollars only.

Second. Nothing in the record shows that the blank sheet of paper sued on as signed by the defendant, was signed in order that a curator's bond might be written over the signatures. No order of the Court of Probates accepting the curator's securities, or fixing the amount of the bond, or even requiring a bond to be furnished, has been produced; and it is impossible to say what may have been the object of those who signed the paper. Nay, the idea of its being for the purpose of being made a curator's bond, is negatived and removed by the answers of the defendant to the interrogatories, in which he says that he never considered himself security of Mudd as curator of Mayfield's estate. This shows that when he signed the paper, he did not *then* consider himself as contracting the obligation for which he is now sued. The answers of the defendant to the plaintiff's interrogatories stand uncontra-

dicted, and it would require very strong proof to destroy their effect. The facts that the defendant acted, on many occasions, as the counsel of the curator; that the blank paper was found among the papers of Mayfield's succession in the parish judge's office; and that the defendant was appointed and also acted as the counsel representing the absent heirs of the deceased, might perhaps raise a presumption that he was not ignorant that his client had furnished no bond; but such circumstances are very far from being sufficient to make us presume that the paper in question was signed by him as the curator's security, and cannot in any way counterbalance or affect the faith and credit which we feel disposed to put in the statement under oath of a member of the bar, whose veracity we have never had any occasion to suspect.

Judgment affirmed.

NATHANIEL COX *v.* WALTER BRASHEAR.

APPEAL from the District Court of St. Mary, *King*, J. The plaintiff claimed $4013 64, with interest at five per cent from the 10th August, 1832. There was a judgment in his favor for the amount, with interest from the 21st of June, 1833, from which the defendant has appealed.

GARLAND, J. This suit is brought on two bonds, which the defendant signed as the surety of Robert Brashear, curator of the vacant estate of William S. Barr, deceased. The plaintiff alleges that the curator has not administered the estate according to law; that he has squandered the funds; that he has not paid the debts; that he is insolvent; and has rendered no account. Barr died about the month of February or March, 1832. The curator was appointed soon after. On the 24th of May, 1833, he presented to the Probate Judge, a list of debts due by the succession, with the amount of funds on hand to be distributed among the creditors at that time; and also his account. At the head of the list of creditors, Nathaniel Cox is placed for the sum of $4519 72. The curator prayed that the list or statement of debts, and his *pro rata* dis-

tribution and account might be homologated, and that he might be continued in office another year, as the estate was not yet settled. A judgment of homologation was rendered after the proper notices, and an opposition made by one of the creditors; the *pro rata* share of Cox was fixed, and nearly the whole amount of it paid to him. The curator was continued in office for another year, but the defendant was not his surety on the bond given for the second year. On the 22d May, 1834, the curator presented to the Probate Court a second list of creditors, including all on the previous list who had not been paid, except Cox, with one or two new creditors. He also presented a *pro rata* distribution of the funds then on hand, and asked again to be continued in his curatorship. At the foot of the list of creditors, the curator adds: "Cox' claim is left out of this tableau, it being intended to dispute it, a sufficient fund being retained to pay him in the same proportion as the other creditors, if his claim be finally allowed." He also states that the estate was solvent. He prayed that he might be permitted to pay the creditors *pro rata* as stated, and that he might be continued another year in the administration. On the 16th of June, 1834, this account was homologated, and the curator continued in his functions for another year. He gave a new bond, shortly after this re-appointment, with the defendant as surety, since which time he has rendered no account of his administration, and is proved to have become insolvent. It is not shown that Cox had any notice of the filing of this second tableau or list of debts, further than the statement in the judgment that the usual publication had been made.

The inventory and sales show, that Barr's estate was represented to be worth upwards of $22,000. The debts are shown to have been about $15,000, including Cox'. At the time of filing the second tableau or list, the curator represents the whole amount of debts, exclusive of that in controversy, as $7288 36, and states that he has on hand applicable to the payment of them $4092 75, after retaining a sufficient amount to pay Cox his *pro rata* dividend, if entitled to it. It appears by an inventory that $6490 64 of accounts, notes, &c. have been delivered to a subsequent curator.

This suit is brought on the first and third bonds given by the

curator, and the plaintiff alleges that he is entitled to recover, as his claim has been liquidated by the curator, placed on the list of debtors, and regularly recognized and approved by the Court of Probates in a legal manner, which judgment has been in part executed by the party, and has now the effect of *res judicata*. He avers that the curator had no right to annul the approval and recognition of his debt by the Court of Probates without notice, and a regular action to set aside what had been done by it; and further alleges that the defendant is bound by the judgment, and cannot contest its validity or amount.

The defendant contends, that he is not bound by the judgment or order of the Court of Probates; that he was neither party nor privy to the proceedings. He further says that the judgment was obtained through error or fraud, and is, or ought to be as to him, a nullity.

The case has been argued upon all these points, and many authorities have been cited to sustain these positions, and others settled in the case of *Parmele and Baker* v. *Brashear*, 16 La. 72.

A careful examination of the facts, relieves us from the necessity of examining these questions. For if we allow the defendant the benefit of all his positions, the plaintiff would still be entitled to recover. The number of accounts in the record, and the mingling, in some instances, of the individual affairs of the defendant, with those of the succession of Barr, have produced some confusion. It appears that, in August, 1831, Barr wanted to raise some money; and that the defendant made a note payable to Cox, and lent it to Barr, which note fell due in April, 1832. This note Cox held at the time of Barr's death in March, 1832. Barr and Cox were engaged in business together, the latter being a factor in New Orleans, and the former a merchant in the country. On the 31st of August, 1831, an account current was stated, in which the note is not included, showing a balance of $12,590 01 in favor of Cox. Various transactions took place between the parties between that time and Barr's death, which changed the state of the accounts; and at that period Cox had in his hands $1901 57; but the note of $2500 was to be paid; and at the same time there were various acceptances of Cox for Barr outstanding, amounting to about $2400, drawn previous to Barr's death, which fell due

about six months after, which Cox had not then paid. This accounts for the expression in his letter to Birdsall, written soon after Barr's death, that he was then in debt to Barr, if the note of $2500 were provided for. The note of $2500 was not paid by the defendant at maturity, but renewed at four months; and when the new note fell due, it was renewed on the 17th of December, 1832, at four months. It does not appear that this note was ever paid by the defendant; and we find a receipt in the record, in which the curator acknowledges that he has received that note, and another of the same person for $1700, dated December 20, 1832, for which he is to account as curator. These two notes are represented in all the accounts as the debts of Barr. He is charged with them when given, and when they fall due and are renewed is credited with the amount of the old note. There is no evidence that the notes mentioned in the receipt have been paid. Their being in the possession of the curator is accounted for by his receipt.

The account rendered on the 10th of May, 1832, shows in what way the sum then claimed was due. It was accepted and approved, and the evidence shows that the amount was due. It is too late now to dispute the charges of interest. The accounts in the record show that there have been various transactions since the death of Barr; and we find in the record an account rendered by the executor of Cox, in which it appears that the balance due on the 21st of March, 1837, was $2279 97, for which sum the defendant is responsible, with five per cent interest from that date.

The judgment of the District Court is, therefore, annulled; and this court, proceeding to give such judgment as in its opinion ought to have been given in the court below, orders that the plaintiff recover against the defendant, the sum of two thousand two hundred and seventy-nine dollars and ninety-seven cents, with interest thereon, at the rate of five per centum per annum, from the 21st day of March, 1837, until paid, with the costs in the District Court; those of the appeal to be paid by the plaintiff.

Plaisted, for the plaintiff.

Dwight, for the appellant.

JOHN T. TOWLES *v.* ANN A. CONRAD, Administratrix.

The fact that a party was a minor at the time that a judgment was rendered against him, and that his tutor did not attend to, or understand his rights, or take the necessary pains to procure the testimony to establish them, will not entitle him to relief, though it be proved that a different judgment must have been rendered had the proper testimony been produced in the first instance. The first judgment is *res judicata*.

APPEAL from the Probate Court of St. Mary, *Dumartrait*, J.

Maskell and *Lewis*, for the appellant.

C. M. Conrad and *Voorhies*, for the defendant.

GARLAND, J. The petitioner states that, after the death of his mother, his father, being his natural tutor, gave a receipt on the 8th of June, 1818, wherein he acknowledged to have received from the succession of the petitioner's grandfather, in a tract of land in the State of Mississippi, the sum of $4,000. He further alleges, that some years ago, his tutor, appointed after the death of his father, instituted a suit against the present defendant, to ascertain the amount due to him as the heir of Susan Turnbull, his mother; that in that suit, the tutor specially stated, that not having a personal knowledge of the petitioner's rights, he may have omitted to set forth some of the claims to which he was legally entitled, in which event, it was prayed that he might not be injured by such omission. He says that, at the time of instituting and trying said suit, it was not known to his tutor, nor to the persons by whom his rights were prosecuted, that his father had not received the land in kind, but that the price only had been received. He now alleges, that the estate of Turnbull, his grandfather, was indebted to his mother for a balance on her portion; that Robert Semple, the husband of Isabella Turnbull, a maternal aunt of the petitioner, was indebted to the succession of the common ancestor in about the same sum, as an excess over his wife's portion; and that Semple agreed to give a tract of land belonging to him, near Pinckneyville, in Mississippi, to the executrix in payment, which tract of land Towles, the father, agreed to take from the executrix of Turnbull's estate in payment of what was

owing to his wife, the mother of the petitioner. That Semple did not, at the time of this transaction, which was in the spring of the year 1812, make any deed of the land to the executrix, nor did she make any deed to Towles; but that the latter, in a short time, sold the land to one Yerby, who gave his notes to Towles for $4,500, payable in one and two years, and that to save the necessity of making several deeds, Semple conveyed the land directly to Yerby, stating the consideration to be $3,500 in cash; that on the next day, Yerby mortgaged the land to Towles, to secure the payment of the notes; and that they were afterwards discharged in full, with interest according to the laws of Mississippi. That a receipt was, on the 8th of June, 1818, long after the transaction, given by Towles, the father, to the executrix, in which it was erroneously stated that the sum of $4,000 was received in a tract of land, when it was in fact received in money, and that $4,500, with interest, was the true amount received. All these facts and circumstances, it is stated, were unknown to the late tutor of the petitioner, or to himself and his counsel, when the former suit was tried, in consequence of which the demand in that suit was disallowed; but that the Supreme Court, in revising the judgment, "reserved to him any right he might have to the tract of land in Mississippi." He avers that this reservation transferred the rights he was supposed to have on the land in case it remained in kind, to the proceeds, which passed into the hands of his father and natural tutor. That any other interpretation of the reservation would deprive him of his rights and property, and enrich the succession administered by the defendant at his expense. That there would be lesion in the judgment, at the time he was a minor, without his fault or the fault of those who represented him in the first suit. That his claim was excluded by an error of fact on the part of the court, in supposing that the land had not been sold, and that it could be recovered in kind.

He, therefore, prays for $4,500, with interest and a legal mortgage, and for a correction of the error into which the court had fallen as respects this claim.

The defendant denies all the allegations, and further avers, that all these matters, so far as the estate she represents is concerned,

have been inquired into and decided, in the suit mentioned in the petition, which is reported in 10 La. 259; and she, therefore, pleads *res judicata* against the demand.

There was a judgment in the inferior court in favor of the defendant, and the plaintiff has appealed.

We have examined this case with the most earnest desire to extend relief to the plaintiff, but are obliged to decree that the plea of *res judicata* must prevail. The demand is essentially between the same parties. Turnbull, the tutor of the plaintiff, claimed all that was owing to him as the heir of his deceased mother; the defendant is the same, and still acts in the same quality of administratrix. It only remains to inquire whether the the thing demanded be the same, to bring the case within art. 2265 of the Code, and the case of *Plicque et al.* v. *Perret*, 19 La. 318. By reference to the petition filed in the suit decided, we find Daniel Turnbull, the tutor of the plaintiff, suing the defendant for various pieces of property which belonged to the present plaintiff's mother; also for a settlement of the community that existed between his father and mother, for the hire of slaves, and for a large amount in money. Among other allegations in the petition is one, that John Towles, the father of the plaintiff, on the 8th of June, 1818, signed a receipt acknowledging that he had, at different times, received on account of his first wife, the plaintiff's mother, the sum of $11,375. To make up this sum the $4,000 were included. The plaintiff chose to assume that Towles (the father) had sold the land, which the receipt stated he had received, and he claimed the proceeds of the sale. This court, in its opinion, says: "it does not appear that the land was conveyed to Towles for that price, or that he had disposed of it. The title to the land and the slaves specified in the receipt, rests on the same ground; and the slaves have been received by the plaintiff under it." The plaintiff wished the court to presume that Towles, the father, had sold the land; but it declined to do so, and decided that the plaintiff could not make his estate liable for that which might yet exist in kind, and which was presumed to so exist, as there was no intimation of a sale, nor attempt to prove it. 10 La. 261.

There cannot be a doubt that, if the plaintiff had offered the same evidence in the first suit as in this, he would have recovered; and the question is simply this, whether, if a party does not understand his own case, or will not take the necessary pains to obtain testimony, he can afterwards have relief, on an allegation that he was a minor, and that his representative did not attend to, or understand his true rights. We think he cannot. The receipt which was then relied on, is again offered in evidence, and relied on with accompanying explanations. The information now given, was then in the possession of the plaintiff's near relatives and neighbors; his tutor knew, that a sale could not be proved by parol evidence unless under special circumstances, much less be presumed by a court of justice. This tribunal did not, therefore, fall into an error of fact in their former judgment, but decided upon the plaintiff's case, as his legal representatives presented it. What was demanded in the first suit? The proceeds of the land unquestionably. What does the plaintiff now demand? The proceeds of the same land, beyond all doubt; for his own evidence shows that his father never received the amount claimed, in money, from the executrix of Turnbull's estate. The sum owing by that estate did not amount, according to Sterling's testimony, to the amount claimed, which shows that Towles, the father, had sold the land at a profit.

The plaintiff insists that the reservation made by the court in its judgment, protects him, and will enable him to avoid the plea of *res judicata*. We do not think so. Any *right* he had to the land itself is reserved, but it is absurd to suppose that the court intended to reserve a right to that which had been rejected absolutely, unless it were expressly so stated.

Judgment affirmed.

BAPTISTE COMEAU *v.* JEAN MELANÇON.

APPEAL from the District Court of La Fayette, *King*, J.

Voorhies, for the appellant.

Lewis, for the defendant.

MORPHY, J. The petitioner alleges that he is the owner of a tract of land in Côte Gelée prairie, in the parish of La Fayette, containing 485 acres and $\frac{88}{100}$, which he acquired in virtue of his settlement and cultivation prior to the year 1803, and of a confirmation of his claim by an act of Congress in 1816; that his claim has been regularly surveyed and located, under the authority of the United States; that he has, for more than thirty years, been in the quiet, peaceable, and uninterrupted possession of the land, and had every reason to believe that he had an indisputable title to the same, when the defendant, without any right whatsoever, entered upon his premises, and erected on a portion thereof fences, houses, &c., with a view to use and cultivate the same as his own, thereby trespassing upon his (the petitioner's) land, and causing him damages to the amount of $500. He prays to be declared the legal owner of the land, and to be quieted in the possession and ownership thereof, and for damages. The answer avers that the defendant never enclosed or cultivated any land belonging to the petitioner; that all the land which he possesses and cultivates, belongs to a tract which he owns in the parish of La Fayette, at the place called Côte Gelée, containing three and two-thirds *arpens* in front, by a depth of forty *arpens;* that his (defendant's) title is derived from a Spanish grant to one Dauterive of one league and a half in front, which was afterwards sold in small portions to different individuals, and among others, to Simon Broussard, who purchased a piece of twenty-three *arpens*, which has since been regularly confirmed to him by the government of the United States, and that he (defendant) holds his tract from the said Simon Broussard through sundry mesne conveyances; that each of the portions sold by Simon Broussard was regularly located under the Spanish government by François Gousolin, a duly authorized Spanish surveyor, in such manner as to fix the front of the several tracts at a certain distance from the bayou Tortue, so as to give to the owners

about an equal portion of wood and prairie land; that he (defendant) and those under whom he holds have been in the peaceable and uninterrupted possession of this land, according to the limits and boundaries fixed by the Spanish surveyor, for more than thirty years under just and sufficient titles, and that he has acquired the prescriptions of ten, twenty, and thirty years which he sets up against plaintiff's action. The judgment of the inferior court having been in favor of the defendant, the plaintiff has appealed.

From the plat of survey executed under an order of the District Court, it appears that the conflict which gives rise to the present controversy, results from the circumstance that the forty *arpens* with a front of three *arpens* and two-thirds on the bayou Tortue, to which the defendant asserts title, are claimed and have been measured from a line fourteen *arpens* and ten links distant from the bayou Tortue, instead of being measured off from the bayou itself, as the plaintiff contends they should be. The forty *arpens* of the defendant, when measured from the line he claims, reach a road in the prairie which separates his field from the house occupied by the plaintiff. The surveyor's *procés-verbal* mentions a post in the prairie close to the edge of the woods, which was represented to him by the defendant as the centre of his forty *arpens*, and as having been planted by Gousolin; the twenty *arpens* on the north side of this post being woods, and the twenty *arpens* on the south side being prairie. The words "front to the bayou Tortue" in the defendant's certificate of confirmation, do not necessarily imply that his tract was to be measured from the margin of the bayou. But be this as it may, the defendant has entirely rested his case on his plea of prescription; all the titles under which he holds and which go back as far as August, 1813, call for twenty *arpens* of wood land, and twenty *arpens* of prairie land; and the testimony establishes that the defendant, and those under whom he holds, have cultivated the tract he claims to within one *arpent* and a half of the house of Comeau for the last twenty years, and that the defendant and the adjoining proprietors, holding under the same grant as himself, have always possessed twenty *arpens* in the woods, and have cultivated the land in the prairie to the end of the remaining twenty *arpens*, making the forty *arpens* called for by their titles, although they occasionally changed their fields; that Morvan, a

former proprietor of the tract now owned by the defendant, and who possessed it about thirty years ago, extended his fences to within three *arpens* of the place where Comeau's house now stands, and cultivated the land up to that point. The plaintiff seems to have been himself perfectly aware of the location and extent of his neighbor's tract, for Joseph Bernard, one of the witnesses, informs us, that when he built the plaintiff's house, about twenty-three or twenty-four years ago, he advised him to place it about one *arpent* nearer the bayou Tortue, the position appearing to him more eligible, but that the plaintiff answered that he could not, as the lines of the adjacent proprietors were very near, and he was afraid of finding himself upon the lands of those who fronted on the woods. The testimony moreover establishes, that the space between the line claimed by the plaintiff, and the bayou Tortue, which is very low ground, has always been considered as public domain, and so treated, by every one. With such evidence before him, it appears to us that the inferior judge did not err in sustaining the defendant's plea of prescription. Civ. Code, art. 3464.

Judgment affirmed.

FRANÇOIS RICHARD, Administrator, *v.* WILLIAM H. PARROTT and Wife.

A *brand* or herd of *running* cattle, advertised and sold as consisting of a certain number, amounted, in fact, to not more than a third. In an action for the price, defendants, having sold a part of the cattle, prayed for a rescission of the sale, or diminution of the price. *Held*, that as defendants could not return all the cattle they had received, the sale could not be rescinded, and that a diminution of the price was properly allowed.

APPEAL from the District Court of St. Landry, *Boyce*, J.

Linton, for the appellant.

T. H. Lewis and *W. B. Lewis*, for the defendant.

MARTIN, J. The plaintiff claims from the defendants the price at which the *brand* or running cattle of a succession, administered by the former, was sold. In the answer, the defendants claim the rescission of the sale, or a diminution of the price. One of

the heirs of the succession illegally drove away a few of the cattle to a distant parish; and, moreover, the defendants could only find about one-third of the number which had been announced, in the advertisement of the sale, as bearing the brand.

The facts were proven, and the District Court granted a reduction of the price, and gave judgment accordingly.. The plaintiff appealed. His counsel has contended: *First*, That the defendants have no right to complain, if they were mistaken in the number of the cattle. *Second*, That if any of the heirs, or other person, drove away part of the cattle, the defendants have their action against such person. *Third*, That if any misrepresentation was made, they may claim a rescission of the sale, but cannot claim a reduction of the price. The appellee has prayed an amendment of the judgment, and that the rescission of the sale may be decreed.

The defendants cannot be relieved in this action, against the act of the heir who drove away a part of the cattle; but they show that the brand was advertised as composed of about five hundred head, and that about one-third only of that number was obtained.

The defendants have sold a part of the cattle which they obtained; so they are not in a situation to demand the rescission of the sale, as they are unable to return all the animals they received. They were, therefore, properly relieved by a reduction of the price.

Judgment affirmed.